SUPREME COURT, U. S
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6041

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,
Appellee-Petitioner,
versus
BEAIRD-POULAN, INC.,
Appellant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

DEPARTMENT OF HIGHWAYS,
STATE OF LOUISIANA,
Appellee-Petitioner,
versus

BEAIRD-POULAN, INC.,
Appellant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Department of Highways, State of Louisiana, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled matter on the 5th day of July, 1974, by the United States Fifth Circuit Court of Appeals, rehearing denied August 21, 1974.

CITATIONS TO OPINIONS BELOW

A judgment of the United States District Court of the Western District of Louisiana, Shreveport Division, No.

17-678, was granted in favor of the Department of Highways, State of Louisiana, dismissing the respondent's complaint, holding that petitioner was prohibited by the law of Louisiana from complying with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and that it was the congressional intent to exempt Louisiana from the applications of this federal statute because of the provisions contained in Louisiana's Constitution. The Fifth Circuit Court of Appeals reversed the District Court and remanded for further proceedings, holding that Louisiana could comply with the Relocation Act of 1970 and that the Constitution of Louisiana did not prohibit it from complying.

The judgment of the District Court appearing in *Appendix "A"* of this application is reported at *362 F.Supp. 547 (1973)*.

The opinion of the United States Court of Appeals for the Fifth Circuit at New Orleans, appearing at *Appendix "B"*, and the PER CURIAM Opinion on a petition for rehearing in said matter, appearing at *Appendix "E"* of this application, is not yet reported in the Federal Reporter.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to Title 28, Section 1254, Paragraph 1, United States Code Annotated.

QUESTIONS PRESENTED

1. Where the Relocation Assistance Act of 1970 provides for an extension of time to July 1, 1972, for those states whose laws prohibit the payment of relocation assistance and or moving costs, do those states have until July 1, 1972, to comply with the Act, and should any suit filed pursuant to that Act prior to July 1, 1972, be dismissed?

2. If the declared Congressional intention for granting the extension of time in the Relocation Assistance Act of 1970 to July 1, 1972, was specifically for the benefit of the State of Louisiana, can the Appellate Court deny Louisiana the extension of time provided in the Act, and can it allow a suit to be filed against Louisiana for relocation assistance and or moving costs prior to July 1, 1972?

3. Where the State of Louisiana amended its Constitution to provide for relocation assistance after the effective date of the Relocation Assistance Act of 1970, but before the extension provided in the Act, can Louisiana be subjected to suit to recover relocation assistance and or moving costs prior to the date it amended its Constitution or the extension date of July 1, 1972, whichever comes first?

4. Is it discriminatory and conflicting for an Appellate Court to conclude in one case that the Congressional intent cannot be circumvented, and on the same day in a second case, to refuse to abide by the declared intent of Congress to interpret the Act that allows Louisiana an extension of time within which to comply?

5. Can an Appellate Court refuse the State of Louisiana an extension of time to July 1, 1972, within which to comply with the Relocation Assistance Act of 1970, and can it allow a suit against Louisiana for relocation assistance and or moving costs which were incurred prior to July 1, 1972, or prior to the date Louisiana amended its Constitution, where Louisiana and a Congressional inquiry both determined that the Louisiana Constitution, Article IV, Section 12, Article VI, Section 22(c), Article VI, Sections 23(1) and 23(4), Article VI, Sections 23.1(1) and 23.1(4), and the related jurisprudence of Louisiana had to be amended to provide for relocation assistance?

6. Was the Appellate Court decision in violation of 42 U.S.C.A., Sections 4601 et seq., which gave Louisiana an extension of time within which to comply with the Relocation Assistance Act of 1970?

STATEMENT OF THE CASE

Respondent, Beaird-Poulan, Inc., filed a complaint on March 14, 1972, against the petitioner, Department of Highways, State of Louisiana and John A. Volpe, who was then the Secretary of the Department of Transportation. The action was filed pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C., Sections 4601, et seq., effective January 2, 1971.

Respondent, Beaird-Poulan, Inc., alleged that as a result of an expropriation proceeding entitled "State of Louisiana, through Department of Highways vs. Beaird-Poulan, Inc." No. 202,136 upon the docket o. the 1st

Judicial District Court of Caddo Parish, Louisiana, it was a "displaced person" and was forced to move certain machines, equipment, office supplies, etc. from its property to a new location, and said move took place during the months of April and May 1971. Respondent claims that the actual and reasonable expenses incurred by it in making this move amounted to $217,082.46, and that the petitioner, Department of Highways, has refused to pay said moving expenses.

The respondent further alleged that the Secretary of Transportation, under the terms of the aforesaid Act, had a mandatory duty to amend any grant to, or contract or agreement with Louisiana, to include the cost of relocation expenses. Further, the Secretary of Transportation had the mandatory duty to refuse to approve any grant to, or contract or agreement with Louisiana, unless he received satisfactory assurances from Louisiana that fair and reasonable relocation payments shall be provided to displaced persons.

The respondent prayed for:

(a) A money judgment against the State of Louisiana in the sum of $217,082.46,

(b) a preliminary injunction and permanent mandatory injunction ordering the Secretary of Transportation (1) to amend all grants, contracts or agreements with the Department of Highways to include the cost of relocation expenses as of January 2, 1971, and (2) to refuse to approve any grant to or contract or agreement with the Department of Highways unless satisfactory assurances

are received from the Department of Highways that fair and reasonable relocation payments shall be provided to displaced persons as of January 2, 1971.

Louisiana answered respondent's complaint and averred certain defenses to the two-count complaint, to the effect that:

1. The complaint failed to state a claim upon which relief might be granted;

2. The complainant is without standing to assert the claim contained in its complaint;

3. Because of constitutional prohibition, Louisiana could not comply with the Uniform Federal Relocation Assistance And Real Property Acquisition Policy Act of 1970;

4. The Congress of the United States recognized Louisiana's inability to comply by its (Congress) enactment of the Federal Aid Highway Act of 1970, Public Law 91-605, 84 Statute 1713, when Section 120 of that Act extended the deadline for state compliance from July 1, 1970, to July 1, 1972;

5. The electorate of Louisiana approved a Constitutional amendment (Act No. 182 of 1971) on February 1, 1972, proclaimed by the Governor of Louisiana on February 21, 1972, which, under the Law of Louisiana, became effective 20 days thereafter or on March 12, 1972.

On May 23, 1972, the respondent moved to strike the fourth, fifth, sixth and seventh defenses of petitioner's answers and defenses on the grounds that they were insufficient as a matter of law. On June 14, 1972, defendant, Secretary of Transportation, moved to dismiss the Beaird-Poulan, Inc.'s complaint against the Secretary.

On August 13, 1973, Judge Ben C. Dawkins, Jr., Senior Judge of the United States Federal District Court for the Western District of Louisiana, Shreveport Division, denied respondent's motion to strike and granted the Secretary of Transportation's motion to dismiss for failure of respondent to state a claim. Respondent's motion for new trial was denied by Judge Dawkins on August 23, 1973, and on September 24, 1973, granted a motion to dismiss filed by the Louisiana Department of Highways. From these judgments, respondent, Beaird-Poulan, Inc., appealed to the Fifth Circuit. The Fifth Circuit Court of Appeals, on July 5, 1974, reversed the District Court and remanded for further proceedings.

ARGUMENT FOR GRANTING WRIT

In 1970, Congress passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C., Sections 4601 et seq. (hereinafter referred to as the "Act"). Section 221 of the Act provides as follows:

> "(a) Except as provided in subsection (b) and (c) of this section, this Act and amendments made by this Act, shall take effect on the date of its enactment. (January 2, 1971).
> "(b) Until July 1, 1972, sections 210 and 305 shall be applicable to a state only to the extent

that such state is able under its laws to comply with such sections. After July 1, 1972, such sections shall be completely applicable to all states.
"(c) The repeals made by paragraphs (4), (5), (6), (8), (9), (10), (11), and (12) of section 220(a) of this title and section 306 of title III shall not apply to any State so long as sections 210 and 305 are not applicable in such States."

The above Act of Congress became effective January 2, 1971, for those states which could comply and became effective July 1, 1972, for those states that were extended or who could not comply until that date.

In both the District Court Judgment as well as in the Appellate Court Judgment, the Courts admitted that the legislative history and the intent of Congress, which formed the basis for granting an extension of time in the Relocation Assistance Act of 1970, was specifically done for the benefit of the State of Louisiana. See Conference Report No. 91-1780, U.S. News, 91st Congress, 2d Sess. pp. 5465-5466 (1970) (*see Appendix "M"*).

At the time Congress enacted the Act it realized that Louisiana did have some problems with the payment of relocation costs and allowed the State, by the extension, additional time within which to comply. The respondent, Beaird-Poulan, Inc., brought suit against the State of Louisiana demanding to be paid relocation costs growing out of an apparent move of equipment from its buildings in April and May 1971. The date of expropriation was May 3, 1971, which was subsequent to the effective date of the Act, namely, January 2, 1971, but prior to the effective date of the extension granted by Congress, namely, July 1, 1972.

Beaird-Poulan, Inc. took the position that Louisiana was not extended to July 1, 1972, to comply with the Act, but had to comply immediately with said demand for relocation costs. Louisiana took the position that it was the only state found by Congress to have a problem with the payment of relocation costs and the purpose for which the extension placed in the Act was to allow it an extension for compliance with the Act and the payment of relocation costs to July 1, 1972. It was further the position of Louisiana that, since the expropriation and/or relocation costs incurred by the respondent, Beaird-Poulan, Inc., was prior to July 1, 1972, Louisiana was not obligated to pay Beaird-Poulan, Inc. under the Act.

Throughout this litigation, Louisiana's position has been that its Constitution and the jurisprudence prohibited the payment of relocation or moving costs until the State could amend its Constitution. See Article IV, Section 12, Article VI, Section 22(c), Article VI, Section 23(1) and 23(4), Article VI, Sections 23.1(1) and 23.1(4) *(see Appendices "G", "I", "J" and "K").*

In addition to the above Constitutional provisions, it was Louisiana's position that relocation assistance was not a highway purpose under the laws and the Constitution of Louisiana. See Article VI, Section 19.1 *(see Appendix "L").*

Prior to the Constitutional amendment, under Louisiana jurisprudence, moving costs were held to be non-compensable and *damnum absque injuria. Rapides Parish School Board vs. Nassif,* (La. Supreme Court 1957) 94 So.2d 40; *Department of Highways vs. Ferris,* (La. Supreme Court 1955) 78 So.2d 493. The cost of moving and

relocating a business and the cost of moving any personal property was subject to the same rules in the State of Louisiana. Loss of business from relocation and the closure of a business occuring contemporaneously with the condemnation of the property within the business was found to be non-compensable under the jurisprudence of Louisiana. *Housing Authority of Shreveport vs. Green*, (La. Supreme Court 1942) 8 So.2d 295; *McMahon vs. St. Louis Arkansas & Texas Railroad Company*, (La. Supreme Court 1889) 6 So. 640; *Department of Highways vs. Levy*, (La. Supreme Court 1961) 136 So.2d 35, rehearing denied 1962; *Louisiana Highway Commission vs. Boudreaux*, (La. App. 1st. Cir. 1932) 139 So.521.

The United States District Court, in dismissing respondent, Beaird-Poulan, Inc.'s, suit concluded:

> "Unquestionably, at the time involved, when plaintiff's land forcibly was taken by the State, Louisiana's jurisprudential law did not allow damages for costs of moving or relocation when private private (sic) was expropriated. The rationale stated by the Louisiana Supreme Court for such denial was that expenses of relocation were *damnum absque, injuria. Southwestern Electric, supra*, 145 So.2d, at page 321, McCaleb, Jr., dissenting from the original decision, citing *Rapides Parish School Board v. Nassif*, 232 La. 218, 94 So.2d 240." *(see Appendix "A")*

If we were to accept the Appellate Court's reasoning that Louisiana's law and jurisprudence did not prohibit it from paying relocation costs and moving expenses, we

would have to conclude that the entire jurisprudence on non-compensable items being *damnum absque injuria* did not exist and this would be an illogical conclusion.

Louisiana was not permitted to donate, pledge or grant its money, property rights, credit to or for any person or persons, associations or corporations, public or private. LSA Louisiana Constitution of 1921, Article IV, Section 12, as amended *(see Appendix "G"); James vs. Rapides Parish Police Jury*, (La. App. 2d Cir. 1959) 113 So.2d 88; *Picard Construction Co. vs. Board of Commissioners*, (La. Supreme Court 1926) 109 So. 816.

The funds of the State dedicated for the construction and maintenance of highways could not be diverted to other purposes. LSA Louisiana Constitution, Article VI, Section 22(c) *(see Appendix "I"); State ex rel Varnado vs. Louisiana Highway Commission*, (La. Supreme Court 1933) 147 So. 361. In the *Varnado* case, the Supreme Court of Louisiana held that funds dedicated for the construction and maintenance of highways under Article VI, Section 22(c) of the Louisiana Constitution could not be diverted to other purposes. Also, to the same effect, see *Mallard vs. State*, (La. App. 2d Cir. 1939) 194 So. 447, rehearing denied 1940.

Thus it appears to be clear that Louisiana could not legally make the assurances and payments contemplated by the Act until it amended its Constitution.

Under the Constitutional provisions and the jurisprudence, Louisiana funds could not be dedicated to other purposes than those specified and they were not available for use for relocation assistance, but only for the

specific use or obligation incurred in the construction and maintenance of highways, and since the Courts of the State of Louisiana had maintained consistently over a period of years that relocation costs and other such items were noncompensable, it became necessary to obtain a Constitutional amendment in order for the State to comply with the Congressional Act now at issue.

The Louisiana Legislature passed Act 182 of 1971, which is now Article IV, Section 18 of the Louisiana Constitution *(see Appendix "H")*, to allow for payment of relocation costs. This Constitutional amendment was approved by the voters and became effective March 12, 1972, and allowed the State to participate fully in the payment of relocation costs and to comply with the extension granted by Congress in the Relocation Assistance Act of 1970.

Section 102(b) of the Relocation Assistance Act provides as follows:

> "Nothing in this Act shall be construed as creating in any condemnation proceeding brought under the power of Eminent Domain, any element of value or of damage not in existance immediately prior to the date of enactment of this Act."

In other words, the payment authorized in public law 91-646 (Relocation Assistance Act), upon which this suit is founded, is in excess of or in addition to those payments required to provide just compensation when a condemnation action is brought in the State of Louisiana. The payment of relocation costs are not payments which the Federal Government itself would owe as damages or as

just compensation if it were condemning or otherwise acquiring property for a highway, nor are the relocation costs required payments which a state would have to bear under Eminent Domain Laws. They are payments made from the benevolent sense of Congress.

It is respectfully submitted that, until the Constitution of Louisiana was amended, Louisiana could not authorize the payment of relocation expenses and moving expenses, etc., nor could Louisiana administratively elect to make such payments, because although there was in existence LSA R.S. 48:212, which authorized Louisiana to make agreements with the Federal Government, that section of the law did not and could not authorize Louisiana to agree to do something which violated the Constitution of the State of Louisiana or the jurisprudence as determined by the Courts of Louisiana. The administrative interpretation placed by the State of Louisiana on the Constitution, and statutes in 1968 contemporaneously with the Federal Aid Highway Act of 1968 has been approved by the Federal Highway Administration, by the Congress of the United States and by the Legislature and the people of Louisiana.

The opinion of the Appellate Court reversing the District Court's interpretation would indicate that the travail of the Legislature of Louisiana in proposing an amendment to the Constitution, the vote of the people of Louisiana, on approving the amendment to this Louisiana Constitution and the action of Congress in granting an extension of time for the State of Louisiana to correct the Louisiana Constitution were vain and useless acts by the Congress of the United States. The Fifth Circuit, in its decision *(see Appendix "B", page 5511)*,

acknowledges that the extension in the Congressional Act was made for the benefit of the State of Louisiana because Congress believed that the laws of Louisiana rendered that State unable, at the time, to comply.

It is respectfully submitted to this Court that Congress specifically recognized the plight of Louisiana, or any other State that could not fully comply with the provisions of the Relocation Assistance Act, without a Constitutional amendment, when it extended the effective date for full compliance to July 1, 1972.

It is submitted that the judgment of the United States District Court *(see Appendix "A")* granting the motion to dismiss the suit filed against the State of Louisiana for relocation costs properly interpreted the laws and jurisprudence of the State of Louisiana.

The Fifth Circuit Court of Appeals in its decision concluded that it could not see any prohibition to the expenditure of public funds by the State of Louisiana for a lawfully authorized State purpose and concluded that the State of Louisiana was able to spend highway funds for relocation costs necessitated by the Congressional Act now at issue before this Court. This is an illogical conclusion and is inconsistent with the jurisprudence of Louisiana.

In this same decision, the Fifth Circuit Court of Appeals recognized that Congress had provided for an extension of time to those States that were unable to comply with the Relocation Assistance Act. The Fifth Circuit Court decision even went so far as to acknowledge that Congress had included the extension in the Act for the benefit

of the State of Louisiana because Congress believed Louisiana could not comply with the Act. There appears to be an inconsistency in the decision of the Fifth Circuit in arriving at this conclusion as indicated hereinafter.

On the same day (July 5, 1974), the Fifth Circuit Court of Appeals, in the matter entitled *Named Individual Members of San Antonio Conservation Society et al vs. The Texas Highway Department et al*, No. 74-1231 (*see Appendix "F"*) of the docket of the Fifth Circuit Court of Appeals, at page 5476 thereof, concluded as follows:

> "If Congress had not intended to exempt the expressway from the environmental statutes, there would have been no purpose in passing the legislation. We cannot believe that Congress intended a vain and useless act. Any doubt about the matter, however, is fully resolved by the legislative history which shows without question that Congress drew the bill with the evident purpose of exempting the expressway from the provisions of Federal Environmental laws including NEPA and Section IV(f). The debates in the Senate and the House disclosed this unmistakeably, as do the reports of the Senate and House Committees."

At page 5481 of the same decision, the Fifth Circuit held:

> "Congress having spoken in the matter, we see no reason to attempt to override the solemn expression of its will found in the enactment of section 154."

And the conclusion of the Fifth Circuit found at pag 5483 is as follows:

> "This controversy has now been resolved in the Halls of Congress, which is the proper place in our sy tem of government for priority decisions to be made. 446 F.2d at 1024. We therefore defer to the will of Congress and give effect to its solemn enactment."

However, in the instant case, the Fifth Circuit state

> "This statute became generally effective on January 2, 1971. States which, because of their laws, could not comply as of that date were given until July 1, 1972 to com e into compliance. The legislative history shows that the latter provision [42 U.S.C., Section 4601(b)] was, in fact, made for the benefit of the State of Louisiana because Congress believed [although erroneously, as will be seen later] that the laws of Louisiana rendered that State unable, at the time, to comply, see Conference Report, No. 91-1780, U.S. News, 91st Co g., 2d Sess., pp. 5465, 5466 (1970)."

It would appear from the above that the Fifth Circuit i inconsistent and discriminatory in its application of Con gressional intent. In the Beaird-Poulan, Inc. case (the ins tant case), the Fifth Circuit refused to recognize th *declared* intent of Congress in granting the extension o time to Louisiana in the Relocation Assistance Act However, in the Texas Highway Department case, th

same Fifth Circuit, on the same date, with the same panel of judges, readily acknowledged the intent of Congress and refused to go beyond the intent of Congress in the Legislative Act that was before the Court in that case.

REASONS FOR GRANTING WRIT

(1) The Fifth Circuit Court of Appeals circumvented the declared intent of Congress to give the State of Louisiana an extension of time within which to comply with the provisions of the Relocation Assistance Act of 1970. In the Texas Highway Department case, the same panel of judges, on the same date as the instant case, concluded it would not go beyond the intent of Congress, however, in the instant case, it disregarded the intent of Congress. This is discriminatory.

(2) The Fifth Circuit Court of Appeals incorrectly interpreted the Louisiana Constitution and related jurisprudence to arrive at their conclusion that the State of Louisiana could fully comply with the Relocation Assistance Act of 1970 without the necessity of a Constitutional Amendment.

(3) The Fifth Circuit Court of Appeals failed to take into consideration other provisions of the Constitution of Louisiana, more particularly, Article VI, Section 22(c), Article VI, Sections 23(1) and 23(4), and Article VI, Sections 23.1(1) and 23.1(4).

(4) The suit filed for relocation costs prior to the amendment to the Constitution of Louisiana or prior to the extended date of July 1, 1972, should be dismissed.

(5) The Fifth Circuit Court of Appeal's decision violated the provisions of 42 U.S.C.A., Sections 4601, et seq. granting Louisiana an extension of time within which to comply with the Relocation Assistance Act of 1970.

CONCLUSION

It is submitted to this Honorable Court that the District Court's interpretation of the law and jurisprudence of Louisiana is correct and that the Fifth Circuit Court of Appeals was in error in reversing the decision of the District Court because it circumvented or went behind the intent of Congress to extend to the State of Louisiana until July 1, 1972, to comply with the Relocation Assistance Act of 1970. This is apparent when you observe the conflict in the decisions involving the Texas Highway Department case and the instant case by the same panel of judges on the same date. The Court was discriminatory in that it set up two conflicting standards on its use of the intent of Congress.

It is further submitted to this Honorable Court that the Fifth Circuit Court of Appeals was erroneous in its interpretation and application of the Constitution of Louisiana and the related jurisprudence.

Petitioner prays that this Honorable Court grant a writ to correct a discriminatory injustice and that, in due course, this Honorable Court reverse the Fifth Circuit

Court of Appeals and reinstate the judgment of the District Court.

Respectfully submitted:

DEPARTMENT OF HIGHWAYS,
STATE OF LOUISIANA

D. ROSS BANISTER
WILLIAM W. IRWIN, JR.
JESSE S. GUILLOT

JESSE S. GUILLOT

PROOF OF SERVICE

STATE OF LOUISIANA:
PARISH OF ORLEANS:

BEFORE ME, the undersigned authority, personally came and appeared:

JESSE S. GUILLOT

who declared unto me, Notary, that he is one of the attorneys for the Department of Highways, State of Louisiana, that he hereby certifies that on this date he has served three copies of the foregoing application for a writ to the United States Supreme Court on Thomas J. Wyatt, Esq., attorney for Beaird-Poulan, Inc., by placing same in the United States mail, airmail postage prepaid, to his office at 1100 Mid South Towers, Post Office Box

1574, Shreveport, Louisiana 71165; also three copies to John J. Zimmerman, Esq., attorney for the Secretary of Transportation, by placing same in the United States mail, airmail postage prepaid, to his office address, Appellate Section, Land and Natural Resources Division, Department of Justice, Washington, D.C. 20530; also three copies to the Solicitor General, Department of Justice, Washington, D.C. 20530; also three copies to the Honorable Edward W. Wadsworth, Clerk of the Fifth Circuit Court of Appeals, by placing same in the United States mail, postage prepaid, addressed to his office, 600 Camp Street, New Orleans, Louisiana 70130; and three copies to Honorable Alton L. Curtis, Clerk of the United States District Court, Western District of Louisiana, Shreveport Division, by placing same in the United States mail, airmail postage prepaid, addressed to his office, P. O. Box 106, Shreveport, Louisiana 71161, on this, the ____ day of November, 1974, at New Orleans, Louisiana.

JESSE S. GUILLOT,
Attorney for
Department of Highways,
State of Louisiana
P. O. Box 44245, Capitol Station
Baton Rouge, Louisiana 70804

Sworn to and subscribed before me, Notary, this, the 4th day of November, 1974
EMILE W. SCHNEIDER
NOTARY PUBLIC
(SEAL)
My Commission is issued for life.
Printed Copies Mailed:

APPENDICES

APPENDIX "A"

BEAIRD-POULAN, INC.,

versus

PARTMENT OF HIGHWAYS, STATE OF LOUISIANA

and

ın A. Volpe, Secretary of the Department of Transportation.

Civ. A. No. 17678.

United States District Court,
W. D. Louisiana,
Shreveport Division.

Aug. 13, 1973.

7] DAWKINS, Senior District Judge.

RULING ON PENDING MOTIONS

This action is brought pursuant to the Uniform Reloca-
n Assistance and Real Property Acquisition Policies
t of 1970, 42 U.S.C. § 4601 et seq., effective January 2,
71.

Plaintiff, Beaird-Poulan, Inc., is a Delaware corpora-
on authorized to do and doing business in the State of

Louisiana, located in Shreveport. It is, and was at all times in question here, operating a large plant engaged in manufacturing power chain saws, and marketed on a world-wide basis. The defendants are (1) the Department of Highways, State of Louisiana, a political corporate body which has the power to sue and be sued under Louisiana law, LSA-R.S. §§ 48:13 and 48:22; and (2) John A. Volpe, Secretary of the Department of Transportation of the United States.

[548] Plaintiff alleges it is a "displaced person," as that term is defined in the Act, and in the rules and regulations promulgated pursuant to it. It was forced to relocate certain buildings, machinery, etc., formerly attached to and forming part of real property it owned and upon which it conducted its business, as the result of a large part of land it owned having been expropriated for interstate highway purposes by the Louisiana Department of Highways. As stated, Beaird-Poulan, because of this, and since it already had firm plans for expanding its plant upon the land taken, moved its business from the Greenwood Road in Shreveport, Louisiana, several miles away, to the Flournoy-Lucas Road, also in Shreveport, during the months of April and May, 1971.

The property taken was acquired by legal action in the State Court, for a federally-assisted Project, designated as No. I-220-I(73) 12, commonly known as Interstate By-Pass Highway 220. Plaintiff contends that its actual and reasonable expenses incurred in moving its buildings, machinery, etc., to the new location were $217,082.46, and that the Department of Highways has refused to pay such expenses or to process any administrative claim made by plaintiff for them.

Plaintiff further asserts that the Transportation Secretary has failed and refused to amend the grants, contracts, and agreements with the Louisiana Department of Highways to include the costs of actual relocation expenses, as required under Sections 210 and 211(c) of the Act; and, on the contrary, the Secretary has approved grants, contracts, and agreements with his co-defendant, without receiving assurances that fair and reasonable relocation payments would be paid to it. Plaintiff further contends this was done with full knowledge that the Department of Highways would not provide displaced persons, such as Beaird-Poulan, with fair and reasonable relocation payments.

After the Louisiana Department of Highways filed its answer to plaintiff's complaint, the latter filed a motion to strike certain allegedly insufficient defenses under Rule 12(f), F.R.Civ.P. Subsequently, the United States moved to dismiss plaintiff's complaint against the Secretary on the grounds that plaintiff failed to allege appropriate jurisdiction and that this Court has no jurisdiction over it in this action. Moreover, the Government urges that plaintiff's complaint fails to state a claim upon which relief can be granted.

Specifically, plaintiff seeks now to strike the Fourth, Fifth, Sixth, and Seventh defenses raised by the Department of Highways' pleadings as being insufficient in law. Basically, all four of these defenses hinge upon an interpretation of the federal statute and also upon an Article of the Louisiana Constitution. The principal point made by this defendant is that the Relocation Act, as passed by Congress, but which was in effect after January 2, 1971,

and at the time plaintiff's property was taken, contains the following provision, at Section 221:

> "(a) Except as provided in subsections (b) and (c) of this section, this Act and amendments made by this Act shall take effect on the date of its enactment. [January 2, 1971.]
>
> "(b) Until July 1, 1972, sections 210 and 305 shall be applicable to a State only to the extent that such State is able under its laws to comply with such sections. After July 1, 1972, such sections shall be completely applicable to all States."

It is conceded by all parties that this provision was enacted solely at the behest of the State of Louisiana.

The question then is whether the Department of Highways was prohibited *vel non*, by the laws of Louisiana, from complying with the federal statute at the time plaintiff was forced to move. Louisiana requested this provision for exemption because it felt that under its Constitution it would not be able to comply with the federal Act. Thus, it would be deprived of federal funds for the con- [549] struction of interstate highways and other federally funded road projects.

The pertinent provision of the Louisiana Constitution is Article 4, Section 12:

> "The funds, credit, property or things of value of the State, or of any political corporation thereof,

shall not be loaned, pledged or granted to or for any person or persons, associations or corporations, public or private. . . ."

Plaintiff's counsel in his brief informs us that, after diligent search, the only Louisiana decisions he can find even remotely related to this situation is Department of Highways v. Southwestern Electric Power Co. (SWEPCO), 243 La. 564, 145 So.2d 312 (1962), and the same case, the pertinent language of which is found in the Court of Appeal's decision rendered in 1961, 127 So.2d 309, at 319. In other words, this earlier decision is the only case plaintiff finds to support its position and it can find none which, at the time in question, are opposed to its interpretation of Article 4, § 12. It is argued that the appropriate language in the Court of Appeal's decision construes the Louisiana constitutional provision as not prohibiting the Department of Highways from granting reimbursement for relocation expenses inasmuch as the only language in the jurisprudence of the State on that point has declared that such costs are compensable elements of damage when expropriation of real property occurs. Therefore, we must determine whether this Appeal Court decision supports plaintiff's position. If it does not, then we must determine whether there has been a definitive interpretation of this section of Article 4 by the Louisiana Supreme Court.

Unquestionably, at the time involved, when plaintiff's land forcibly was taken by the State, Louisiana's jurisprudential law did not allow damages for costs of moving or relocation when private property was expropriated. The rationale stated by the Louisiana Supreme Court for such denial was that expenses of relocation were *dam-*

num absque injuria. Southwestern Electric, supra, 14
So.2d, at page 321, McCaleb, J., dissenting from th
original decision, citing Rapides Parish School Board v
Nassif, 232 La. 218, 94 So.2d 40.

Southwestern Electric, supra, involved the question o
whether or not public utility companies had the right to b
reimbursed for the expense of moving their equipmen
and facilities, in order to accommodate construction of In
terstate Highway 20. The utility company there had been
granted a franchise by Shreveport upon streets owned by
it, and the Highway Department required removal of the
equipment (poles and electric lines) in order to construct
the Interstate Highway. It is clear from a reading of the
federal law in existence at that time (1962) that it did not
require any relocation payments, but permitted the reim-
bursement of 90% for any relocation payments actually
made by a state.

The Louisiana Supreme Court in its original ruling held
that the State must reimburse the utility company for
such removal. Its reasoning was as follows: the franchise
granted by Shreveport to SWEPCO was a "property
right," and under the Constitution of Louisiana any ex-
propriation of such right required compensation. Since
the Highway Department expropriated parts of
SWEPCO's property rights, that utility would have to be
reimbursed. The case also involved the question as to
whether the Highway Department had been vested with
the police power of the State by its Legislature; and in the
original opinion, the Court decided that it had not. Jus-
tice McCaleb dissented vigorously with written reasons.
On rehearing, his views were adopted, he then acting as
the organ of the Court.

There, the primary question, as stated by Justice McCaleb, was whether or not the utility's franchise right to use the streets of Shreveport for relocating its lines and poles was a property right of such a nature that it was not subject to a reasonable exercise of the State's po- [550] lice power to require removal or adjustment of the power lines and equipment without reimbursement of the cost expended for the forced change of location. The Court held that there had not been a taking or damaging of the contractual rights acquired by the utility under its franchise agreement. As noted, on rehearing, the Supreme Court reversed its original ruling and that of the Court of Appeal, which had granted the right to compensation for relocation costs.

As also noted, plaintiff invites our attention to the earlier Court of Appeal decision in the same case, State v. Southwestern Electric Power Co., 127 So.2d 309 (1961), and contends that, when read in *pari materia* with the Supreme Court's decision, this earlier decision supports its contention that Article 4, §12, of the Louisiana Constitution did not prohibit the Department of Highways from paying relocation expenses. It cites the following language from the Court of Appeal's decision:

> "We observe the contention in brief of counsel for plaintiff [the Louisiana Highway Department] that the State is prohibited from paying defendant's costs under Article 4, Section 12, of the Constitution. This unqualified statement is not supported by further argument and our examination of Section 12, which prohibits the use of the credit of the State for the benefit of '* * * any person or

> persons, associations or corporations, public or private; * * *', completely fails to establish any basis for the conclusion urged. Plaintiff's actions in the matter destroy this argument, for if it would be a violation to use the funds available for the benefit of a private corporation, it is equally illegal to use such funds for the benefit of a public corporation — the City of Shreveport. We reject this argument as being without merit."

On rehearing, the Louisiana Supreme Court, as noted, made the following statement regarding the Court of Appeal's statement attempted to be used by SWEPCO's counsel on review:

> "Another argument of counsel is that plaintiff is discriminating against the utilities because it agreed to reimburse the City of Shreveport for the removal of water mains and other equipment which the City had placed on the streets.
>
> "Suffice it to say that this is not a legal argument. Whatever plaintiff agreed to do with regard to the City of Shreveport is no concern of the defendant utilities and could not be employed by them as a ground for evading their obligation to remove their facilities from the public way."

The Court finally concluded:

> ". . . [I]t is argued that it is improper to hold that the costs of removal should not be paid by plaintiff for as much as the law of Louisiana does not

prohibit reimbursement and since a proportionate part (90% in this instance) of all monies plaintiff would be required to pay would be recovered from the Federal Government.

"We find no substance in this contention. Liability of the plaintiff for the costs of removal of the utilities' facilities from the public way is not to be determined on its right under the Federal statute to obtain reimbursements of a large proportion of the costs from the United States. On the contrary, such liability is to be resolved by the laws of this State. *The fact that our law may not prohibit reimbursement of the utilities has nothing to do with the plaintiff's* liability *for reimbursement. We hold that no such liability legally exists.*"

We conclude, therefore, that the Supreme Court of Louisiana, by using the words "may not" in the above-quoted provision, did not address itself to whether Article 4, § 12, of the Constitution of Louisiana prohibited the State, through the Department of Highways, from paying relocation expenses. Thus, this leaves the statement of the Second Circuit Court of Appeal as the only extant interpretation of Section 12 of Article 4. As stated, and quoted above, the [551] Supreme Court basically rejected the Court of Appeal's statement pertaining to the use of funds by the Department for the benefit of Shreveport, and not of the utility. Because of the complete reversal of the Court of Appeal decision, plaintiff's interpretation of an attempted distinction between the two decisions is without merit.

Section 32 of the Federal Aid Highway Act of 1968 (PL 90-495; 82 Stat. 815) stated that:

> "Nothing contained in chapter 5 of title 23, United States Code, shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of damages not in existence on the date of enactment of such chapter 5."

Title 23 U.S.C., ch. 5, § 502 et seq., then was the applicable Highway Relocation Assistance statute. It was repealed and now is Chapter 61, U.S.C., Title 42, §§ 4601-4683. It readily is apparent that the payments authorized in Chapter 5 of Title 23 U.S.C. are in excess of or in addition to those required to provide just compensation when a condemnation action is brought. They are not payments which the Federal Government itself would owe as damages or as just compensation if it were condemning or otherwise acquiring property for a highway, nor are these required payments which a state must bear when it expropriates property. These payments are gratuities made from the benevolence of Congress in its handling of the Federal Highway Fund.

[1, 2] Acquisition of property for highway rights-of-way by the Department of Highways of Louisiana is made under the laws of that State, and not under federal law. See Department of Highways v. Southwestern Electric Power Company, *supra*. That Department is required to pay compensation only as defined by Louisiana's law and jurisprudence. See Gray v. Department of Highways,

250 La. 1045, 202 So.2d 24 (1967); Louisiana Highway Commission v. De Bouchel, 174 La. 968, 142 So. 142 (1932).

[3] Under Louisiana jurisprudence, moving or relocation costs have been held to be non-compensable as they are *damnum absque injuria*. Rapides Parish School Board v. Nassif, *supra*. Cost of moving and relocating a business and the cost of moving any personal property are subject to the same rules. Loss of business from relocation and closure of a business occurring contemporaneously with condemnation of the property connected with that upon which the business was located also has been held to be non-compensable. Department of Highways v. Levy, 242 La. 259, 136 So.2d 35 (1962); Housing Authority of Shreveport v. Green, 200 La. 463, 8 So.2d 295 (1942).

If such payments were made (before addition of § 18 to Article 4 of the Louisiana Constitution), other than those items of damage which were compensable prior to March 1, 1972 (when that amendment became effective), they were gratuities, as was the case of relocation assistance payments proposed in the Federal Highway Acts of 1968 and 1970. They were not obligations of the State or its agencies; they were merely charitable donations.

[4] The State and its agencies can pay only its legal obligations; it is not permitted to donate, pledge, or grant its money, property, rights, and credits to or for any person or persons, associations or corporations, public or private. Article 4, Section 12, Constitution of Louisiana, 1921, as amended; James v. Rapides Parish Police Jury, La.App., 113 So.2d 88 (1959).

The legislative history of Public Law 91-605, referring to the exemptions cited previously, reads:

> "Louisiana is the only state affected by this provision. That state must amend its constitution in order to comply with chapter 5." U.S.Code Congressional & Administrative News, pp. 5392-5485, at page 5466, Vol. 3, 91st Cong. 2d Sess., 1970.

[552] It is plain, therefore, that it was the congressional intent to exempt Louisiana from applications of this federal statute because of the provisions contained in Louisiana's Constitution. Congress did recognize the inability of Louisiana to comply with the congressional enactment and that it was necessary that the State pass a constitutional amendment before assurance could be made fully to comply with the congressional Acts. Louisiana amended its Constitution by adding Section 18 to Article 4, which became effective, as noted, March 12, 1972.

[5] Plaintiff suggests that Louisiana approached the problem in this manner in order that it would not have to pay 10¢ on every dollar for relocation payments. We are sure that Louisiana believed its Constitution prohibited such grants to individuals and corporations and would not have gone to the expense of going before Congress, getting this exemption, and incurring the expenses of passing the constitutional amendment (Art. 4, § 18), which had to be submitted to the people for popular vote, in order to save 10¢ on every dollar of relocation expense. Thus, plaintiff's motion to strike the allegedly insufficient defenses must be denied.

Plaintiff concedes that if we should decide that, at the time involved, the Louisiana law prevented the Department of Highways from complying with the relocation Act, then we should dismiss the suit as to both Volpe and the Department of Highways. Accordingly, we grant Volpe's motion to dismiss for failure to state a claim.

We note that under Rule 12(f) of the Federal Rules of Civil Procedure no provision is made for converting the motion to strike insufficient defenses into a motion for summary judgment by the Department of Highways, as is the situation under Rules 12(b)(6) and 12(c). Therefore, that Department should submit a motion for summary judgment, under Rule 56, with supporting affidavits, for our consideration if there is no dispute as to material facts.

APPENDIX "B"

[5510] **BEAIRD-POULAN, INC.,**
Plaintiff-Appellant,

versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA, Claude S. Brinegar, and Secretary of Transportation,
Defendants-Appellees.

No. 73-3453.

United States Court of Appeals, Fifth Circuit.

July 5, 1974.

Appeal from the United States District Court for the Western District of Louisiana

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Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

[5511] COLEMAN, Circuit Judge:

Section 221 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Relocation Act), 84 Stat. 1894, 42 U.S.C., § 4601 note, provides:

> "(a) Except as provided in subsections (b) and (c) of this section, this Act and the amendments made by this Act shall take effect on the date of its enactment.
>
> "(b) Until July 1, 1972, sections 210 and 305 shall be applicable to a State only to the extent

that such State is able under its laws to comply with such sections. After July 1, 1972, such sections shall be completely applicable to all States.

"(c) The repeals made by paragraphs (4), (5), (6), (8), (9), (10), (11) and (12) of section 220(a) of this title and section 306 of title III shall not apply to any State so long as sections 210 and 305 are not applicable in such State."

This statute became generally effective on January 2, 1971. States which, because of their laws, could not comply as of that date were given until July 1, 1972 to come into compliance. The legislative history shows that the latter provision [42 U.S.C., § 4601(b)] was, in fact, made for the benefit of the State of Louisiana because Congress believed [although erroneously, as will be seen later] that the laws of Louisiana rendered that State unable, at the time, to comply, see Conference Report, No. 91-1780, U.S. News, 91st Cong., 2d Sess., pp. 5465, 5466 (1970).[1]

The Relocation Act specifically stated its purpose:

"The purpose of this title is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries [5512] as a result of programs designed for the benefit of the public as a whole." (Relocation Act, § 201).

By March 12, 1972, Louisiana had amended its Constitution and statutes in a manner intended to remove all doubt of its ability to comply with the Relocation Act. Thus, in this case, we deal with an apparently non-recurrent type of lawsuit.

Article IV, § 2 of the Louisiana Constitution of 1921, at times pertinent to this litigation, provided as follows:

> "The funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, associations or corporations, public or private; nor shall the State, nor any political corporation, purchase or subscribe to the capital stock or stock of any corporation or association whatever, or for any private enterprise. Nor shall the State, nor any political corporation thereof, assume the liabilities of any political, municipal, parochial, private or other corporation or association whatsoever, except as otherwise provided in this Constitution; nor shall the State undertake to carry on the business of any such corporation or association, or become a part owner therein; provided, the State, through the Legislature, shall have power to grant the necessary rights of way through its public lands for the construction of any railroad, or flood control or navigation canal; and provided, police juries and municipal corporations may, in providing for destitute persons, utilize any charitable institutions within their corporate limits for the care, maintenance and asylum of such persons; and all appropriations made to such institutions for the purpose aforesaid, shall be accounted for by them in the manner required of officials entrusted with public funds. . . ."

This, in general, states the legal background for the litigation, here under review.

In April and May, 1971, in connection with the construction of an interstate highway at Shreveport, Louisiana, Beaird-Poulan, Inc., the plaintiff-appellant, in response to expropriation (condemnation) proceedings brought by Louisiana, was required to move machines, equipment, office supplies, and other items from its manufacturing plant and offices to a new location. The cost of the move is alleged to have been [5513] $217,082.46. The Louisiana Department of Highways refused to pay said expenses or to process any administrative claim therefor in compliance with the Relocation Act. The Secretary of the United States Department of Transportation declined to amend grants, contracts, and agreements with the Louisiana Department of Highways to include the cost of relocation expenses.

Bearid-Poulan filed suit against the Department of Highways for the recovery of its cost and for unjunctive relief requiring the Secretary of Transportation to enforce the Relocation Act as to it and others similarly situated.

The Department of Highways answered that the complaint failed to state a claim upon which relief might be granted and further answered that because of the constitutional prohibition appearing in Article IV, § 12, it could not comply with the Act.

The United States, on behalf of the Secretary of Transportation, moved to dismiss for lack of jurisdiction

and because the complaint failed to state a claim upon which relief could be granted.

The District Court dismissed the complaint.

This was done in reliance upon the provisions of the Louisiana constitutional provision and the decision of the Louisiana Supreme Court in Department of Highways v. Southwestern Electric Power Company, 243 La. 564, 145 So.2d 312 (1962). It was further pointed out that Louisiana, under the law then existing, was not *required* (emphasis ours) to pay compensation for relocation costs incurred in expropriation cases, citing Gray v. Department of Highways, 250 La. 1045, 202 So.2d 24 (1967); Louisiana Highway Commission v. DeBouchel, 174 La. 968, 142 So. 142 (1932); Rapides Parish School v. Nassif, 232 La. 218, 94 So.2d 40 (1957); Department of Highways v. Levy, 242 La. 259, 136 So.2d 35 (1962), and Housing Authority of Shreveport v. Green, 200 La. 463, 8 So.2d 295 (1942).

[5514] The District Court concluded that any payment of relocation costs by the State of Louisiana would constitute a gratuity and that such a donation was prohibited by its Constitution, Article IV, § 12. Further, since the Louisiana law prevented the Department of Highways from complying with the Relocation Act, the Secretary of Transportation should likewise be dismissed.

It is beyond doubt that in the existing state of the law Louisiana was not *required* to pay relocation costs. As we view the issue, however, this did not necessarily mean that, in the words of the federal relocation statute, it was *unable* to do so.

We do not read Department of Highways v. Southwestern Electric Power Company, *supra*, as shedding any precedential light on this litigation. In that case, the Power Company refused to move its lines and poles from city streets which were to be converted into the interstate highway system unless it was paid for the cost of the relocation. The Louisiana Supreme Court denied removal expense relief on the ground that removal was required by the franchises which had granted the use of the streets in the first place, for, indeed, under Louisiana law a corporation may not acquire any proprietary interest in a street.

This case was decided in 1962, eight years before the enactment of the federal relocation act. The Federal Highway Act of 1956, as then written, did authorize the payment of relocation costs to public utilities. Of this, the Louisiana Supreme Court said:

> "Finally, counsel, citing the Federal Highway Act of 1956 (23 U.S.C. Sec. 123), assert that, since Congress recognized therein that relocation of utility facilities was a necessary part of highway construction in the interstate highway system and specifically authorized the use of Federal funds to reimburse states for the Government's proportion of the amounts paid to the utilities for costs of relocation of their [5515] facilities, it has evidenced its intent that such relocation costs are unprecedented and should not be required to be borne by the utilities. From this predicate, it is argued that it is improper to hold that the costs of removal should not be paid by plaintiff

forasmuch as the law of Louisiana does not prohibit reimbursement and since a proportionate part (90% in this instance) of all monies plaintiff would be required to pay could be recovered from the Federal Government.

"We find no substance in this contention. Liability of plaintiff for the costs of removal of the utilities' facilities from the public way is not to be determined on its right under the Federal statute to obtain reimbursement of a large proportion of the costs from the United States. On the contrary, such liability is to be resolved by the laws of this State. The fact that our law may not prohibit reimbursement of the utilities has nothing to do with the plaintiffs' *liability* for reimbursement. We hold that no such liability legally exists."

Article IV, § 12 of the Louisiana Constitution was not mentioned in the opinion of the Court. It dealt, very clearly, with an *authorization* that federal funds might be contributed toward the relocation costs of public utilities. It did not deal, as here, with a specific congressional command that such relocation costs *should be paid*, the only exception being the provision that a state should not be required to comply prior to July 1, 1972 if its laws rendered it unable to do so.

Left, as we are, with no definitive decision of the Louisiana Supreme Court on the pertinent aspects of Article IV, § 12, we must construe it according to its own terms. We see nothing in it to prohibit the expenditure of public funds for a lawfully authorized state purpose. Such

could in no wise be considered a loan, a pledge, a grant, or a mere donation.

[5516] In another context, the Louisiana Supreme Court has so held. See Caldwell Brothers v. Board of Supervisors, 176 La. 825, 147 So. 5 (1933), wherein it was stated:

> "*The purpose of this article was not to hamper state agencies or boards in the exercise of their proper functions, or in the conduct of their legitimate affairs, but to put an end to the practice of the Legislatures to pledge the credit of the state to aid private enterprises.* Benedict v. City of New Orleans, 115 La. 645, 39 So. 792." 147 So. at p. 7. (Emphasis added).

This reduces us to the ultimate question: Did the laws of Louisiana in April and May, 1971, render the State [the Department of Highways] unable to spend highway funds for relocation costs necessitated by the interstate highway system? We think not.

On the authority of Short & Murrell v. Department of Highways, 233 La. 735, 98 So.2d 170 (1957), involving payment for the construction of a Highway Department Headquarters building, we have no doubt that the State Department of Highways had the authority to contract with the United States for the construction of interstate highways, including all matters necessary, appropriate, or incidental thereto.

Particularly pertinent to this decision were Sections 48:22 and 48:26 of the Louisiana Revised Statutes, which read as follows:

"§ 22. Powers

The department has all of the rights, powers, and immunities incident to corporation. It may acquire, own, administer, alienate, and *otherwise dispose of all kinds* of property, movable and immovable, tangible and intagible; contract; adopt, alter, or destroy an official seal; sue and be sued, implead, and be impleaded."

"§ 26. Incidental powers

Except as otherwise expressly provided by this Chapter, the department may perform every act necessary, conven- [5517] ient, or incidental to the exercise of its power and authority, the discharge of its duties, or the performance of its functions."

Even more appropriate to the issue now under consideration is Section 48:212 of the Louisiana Revised Statutes:

"§ 212. Agreements with federal government

A. The department may enter into any agreements with the federal government or with any federal agency for the purpose of building or improving public highways and flight strips, to the extent that the federal government or its agency is authorized by federal statutes to enter into such agreements, and with the same limitations."

From all this we conclude that while the State of Louisiana, acting by its Department of Highways, was

not required by its own law to pay relocation costs it was, nevertheless, clearly able under those laws to comply with the Relocation Act of 1970. The cited statutes authorized such a course and Article IV, § 12 of the Louisiana Constitution does not prohibit it.

The defenses raised by the Secretary of Transportation originate in the argument that Louisiana could not lawfully comply with the Act. Assuredly, he was, and is, willing to comply. Our decision moots the issues raised by him and thus we do not decide them.

The judgment of the District Court is reversed and remanded for further proceedings not inconsistent herewith.

Reversed and remanded.

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3453

BEAIRD-POULAN, INC.,
Plaintiff-Appellant,
versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA and CLAUDE S. BRINEGAR, SECRETARY OF TRANSPORTATION,
Defendants-Appellees.

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

The Department of Highways, State of Louisiana, defendant-appellee above named, presents this, its petition for a rehearing in the above entitled cause, and, in support thereof, respectfully shows:

I.

That the decision of this Honorable Court on July 5, 1974, reversing and remanding this matter back to the District Court, is in conflict with a decision rendered on the same date, entitled *Named Individual Members of the San Antonio Conservation Society et al v. The Texas Highway Department et al,* No. 74-1231 of the docket of this Honorable Court, with the Honorable Robert A. Ainsworth, Jr. as the organ of the Court (copy annexed to this petition for rehearing).

II.

That in the instant decision, with Judge James P. Coleman as the organ of the Court, it was stated on page 5511 of said decision:

> "This statute became generally effective on January 2, 1971. States, which because of their laws, could not comply as of that date were given until July 1, 1972 to come into compliance. *The legislative history shows that the latter provision [42 U.S.C., Section 4601(b)] was in fact, made for the benefit of the State of Louisiana because Congress believed (although erroneously, as will be seen later) that the laws of Louisiana rendered that State unable, at the time, to comply, see Conference Report, No. 91-1780, U.S. News, 91st Cong., 2d Sess., pp. 5465, 5466 (1970).*" (Emphasis Added)

III.

Yet, in decision No. 74-1231 (copy of which is attached hereto), decided on the same date by the same panel of Judges, the Court stated on page 5476 thereof:

> "If Congress had not intended to exempt the Expressway from the environmental statutes, there would have been no purpose in passing the legislation. *We cannot believe that Congress intended a vain and useless act. Any doubt about the matter, however, is fully resolved by the legislative history which shows without question that Congress drew the bill with the evident purpose of exempting the Expressway from the provisions of federal environmental laws including NEPA and section 4(f).* The debates in the Senate and House disclose this unmistakably, as do the reports of the Senate and House Committees." (Emphasis Added)

On page 5481 in the decision of No. 74-1231, this Honorable Court further held:

> "Congress having spoken in the matter, we see no reason to attempt to override the solemn expression of its will found in the enactment of section 154."

And the conclusion of the Court, on page 5483, was:

> "This controversy has now ' "been resolved in the Halls of Congress, which is the proper place

in our system of Government for priority decisions to be made." ' 446 F.2d 1024. We therefore defer to the will of Congress and give effect to its solemn enactment."

IV.

That due to the fact that it was the admitted intent of Congress to give the State of Louisiana until July 1, 1972, to legally comply with the Relocation Assistance Act of 1970, this Honorable Court should reconsider its decision of July 5, 1974, and grant petitioner a rehearing.

V.

That the decision by this Honorable Court failed to take into consideration the other provisions of the Constitution of the State of Louisiana, which were incorporated in defendant-appellee's brief, namely, Article VI, Section 22(c), relative to the General Highway Fund; Article VI, Sections 23(1) and 23(4) of the Constitution of the State of Louisiana relative to the Long Range Highway Fund, and as reaffirmed by the adoption of Article VI, Sections 23.1(1) and 23.1(4) of the Constitution of Louisiana, which funds are dedicated only for the construction, maintenance, and repair of public highways.

VI.

That the decision cited by this Honorable Court, *Short & Murrell v. Department of Highways*, 233 La. 735, 98 So.2d 170 (1957), was not authority for the Department to pay relocation costs and/or relocation assistance, but to

the contrary, was a suit in contract for architectural services rendered in connection with the designing and supervision of the construction of an office building for the Department of Highways for use in the performance of its prescribed duties and functions.

VII.

That LSA-R.S. 48:212 cited by this Honorable Court was likewise not determinative of the issue to pay relocation costs and/or relocation assistance. Paragraph A of this section had to do with agreements with the federal government for the express purpose of building or improving public highways and flight strips and Paragraph B of this section had to do with agreements with federal agencies for the construction, operation, and maintenance of toll roads and toll bridges.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of the District Court be, upon further consideration, affirmed.

RESPECTFULLY SUBMITTED:

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APPENDIX "D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3453

BEAIRD-POULAN, INC.,
Plaintiff-Appellant,
versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA and CLAUDE S. BRINEGAR, SECRETARY OF TRANSPORTATION,
Defendants-Appellees.

SUPPLEMENTAL PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

The Department of Highways of the State of Louisiana, defendant-appellee above named; presents this, its Supplemental Petition for Rehearing in the above entitled cause, and, in support thereof, respectfully supplements its original petition by adding the following:

VIII.

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Public Law 91-646) Section 102 (b) declares the following:

> "Nothing in this Act shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to the date of enactment of this Act."

In other words, the payments authorized in Public Law 91-646, upon which this suit is founded, are in excess of or in addition to those required to provide just compensation when a condemnation action is brought. They are not payments which the Federal Government itself would owe as damages or as just compensation if it were condemning or otherwise acquiring property for a highway, nor are these required payments which a State would have to bear under its eminent domain laws. They are simply payments made from the benevolent sense of the Congress.

IX.

Elsewhere the United States Congress has declared in the United States Code, Title 23, Section 126 that

> "(a) Since it is unfair and unjust to tax motor vehicle transportation unless the proceeds of such taxation are applied to the construction, im-

provement, or maintenance of highways, after June 30, 1935, Federal Aid for highway construction shall be extended only to those States that use at least the amounts provided by law on June 18, 1934, for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes and other special taxes on motor vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues have been pledged, *and for no other purposes,* under such regulations as the Secretary of Commerce shall promulgate from time to time."

X.

The Constitution of the State of Louisiana has also enunciated the same principle. The funds of the Department of Highways of the State of Louisiana are dedicated by the Constitution of Louisiana to the construction and maintenance of highways, see Article VI, Section 22c of the Constitution of Louisiana for 1921 as amended; those funds may not be diverted to other purposes, Louisiana Revised Statutes of 1950, Title 48, Section 163. In the case of State ex rel Varnado v. Louisiana Highway Commission (1933), (the legal predecessor of the Department of Highways) 177 La. 1, 147 So. 361 at page 362, the Supreme Court of Louisiana ruled that the funds dedicated for the construction and maintenance of highways under Article VI, Section 22c of the Constitution cannot be diverted to other purposes, in that particular case the payment of a tort judgment. To the same effect, Mallard v. State, 194

So. 447. All of the funds received by this Department, including those revenues in Article VI, Section 22c, now go into the Long Range Highway Fund and are dedicated to the construction and maintenance of highways, Article VI, Section 23 (1) and (4) which has been reaffirmed by adoption of Article VI, Section 23.1(1) and (4). Any revenues other than those in the Long Range Highway Fund, including special appropriations, go into the General Highway Fund which is also dedicated for the same purposes. LRS 48:161-162.

XI.

Acquisition of property for highway rights of way by the Department of Highways of the State of Louisiana is made under the laws under the State of Louisiana and not under the federal law. See Department of Highways v. Southwestern Electric Power Company, 243 La. 564, 145 So. 2nd 312, at page 329 where the Supreme Court of Louisiana declared as follows:

> "Liability of plaintiff for the costs of removal of the utilities facilities from the public way is not to be determined on its right under the federal statute to obtain reimbursement of a large proportion of the costs from the United States. On the contrary, such liability is to be resolved by the laws of this State. The fact that our law may not prohibit reimbursement of the utilities has nothing to do with the plaintiffs liability for reimbursement. We hold that no such liability legally exists."

XII.

Prior to the adoption of Article IV, Section 18 of the Constitution of Louisiana by the people on the election date of February 1, 1972, there was no provision in the Constitution of the State of Louisiana under which the payments authorized by the Congress in Public Law 91-646 could be made. The State and its agencies theretofore were authorized only to pay legal obligations, they were not authorized to pay from a charitable sense more than was actually owed. Picard Construction Company v. Board of Commissioners, 161 La. 1002, 109 So. 816, cited with approval in Sicula Oceanica, S. A. v. Wilmar Marine Engineering and Sales Corporation, 413 F. 2d 1332 (1969). Persons in position of authority who do make payments in excess of that which is actually owed may find themselves in jail. LRS 14:134.

XIII.

Under the law of Louisiana the costs which are involved in moving and relocating a business have been held not to be reimbursable by the State, as those costs are damnum absque injuria. See Rapides Parish School Board v. Nassif, 232 La. 218, 94 So. 2d 40 at page 43, Department of Highways v. Farris, 227 La. 13, 78 So. 2d page 493. Similarly the loss of businesses from relocating and from the closing of a business have also been found not to be a compensable. See Housing Authority of Shreveport v. Green, 200 La. 463, 8 So. 2d 295 and Department of Highways v. Levy, 242 La. 259, 136 So. 2d 35. Therefore, absent Article IV, Section 18, if such payments are made, not to pay items of damage which are compen-

sable, but simply from benevolent and charitable purposes, those payments are merely charitable donations because they are not obligations of the State and its agencies. Under the Constitution, Article IV, Section 12 of the Constitution of Louisiana 1921, as amended, the State and its agencies are not permitted to donate, pledge or grant its' money, property, rights, or credits, to or for any person or persons, associations or corporations, public or private. See James v. Rapides Parish Police Jury, 113 So. 2d 88, Picard Construction Company v. Board of Commissioners, 161 La. 1002, 109 So. 816. Relocation assistance is not a highway purpose under the laws and constitution of Louisiana, Article VI, Section 19.1, according to the Supreme Court of Louisiana in State v. Bradford, 242 La. 1095, 141 So. 2d 378, at page 386.

XIV.

It, of course lies within the power of Congress to change the use for which federal funds may be applied, as it has done with junk yard and advertising regulations, and now with real estate acquisition policies. The State of Louisiana could not immediately follow the congressional change of direction as its limitations, as is true of many States, are embedded in the Constitution of the State as well as in the statutes and jurisprudence. It was necessary, before the welfare program contained in Public Law 91-646 could be implemented by Louisiana that the Louisiana Legislature propose an amendment to the Constitution and that such amendment be approved by the people of Louisiana. Such an amendment was offered in 1970 in connection with the Federal Aid Highway Act of 1968, however, that amendment was rejected by the people. Again in 1972 the people were submitted a

proposal to amend the Constitution of Louisiana in order to carry out the provisions of Public Law 91-646, and on February 1, 1972, the people did approve the new proposal, that proposal now being Article IV, Section 18, of the Constitution of Louisiana.

XV.

It is respectfully submitted that, until the Constitution of Louisiana was amended, the Legislature of Louisiana could not change the statutes to authorize the payment of relocation expenses and moving expenses, etc., nor could the Department of Highways of the State of Louisiana administratively elect to make such payments, because although there was in existence LRS 48:212 which authorizes the Department to make agreements with the Federal Government, that section of the law did not and could not authorize the Department to agree to do something which violated the Constitution of the State of Louisiana.

XVI.

The administrative interpretation placed by this Department on the Constitution and Statutes in 1968 contemporaneously with the Federal Aid Highway Act of 1968, (Section 30 being the predecessor to Public Law 91-646) has been approved by the Federal Highway Administration, by the Congress of the United States and by the Legislature and people of Louisiana. No good reason for violating the contemporaneous construction rule has been demonstrated. Is this court to say that the travail of the Legislature in twice proposing an amendment to the

Constitution, the two votes of the people and the action of the Congress in granting a delay were vain and useless?

WHEREFORE, upon the foregoing grounds it is respectfully urged that this Supplemental Petition for Rehearing be granted and that the judgment of the District Court be, upon further consideration, affirmed.

Respectfully Submitted:

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APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-3453

BEAIRD-POULAN, INC.,
Plaintiff-Appellant,
versus

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA, CLAUDE S. BRINEGAR, Secretary of Transportation,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING

(August 21, 1974)

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Department of Highways, State of Louisiana in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX "F"

[5467] **NAMED INDIVIDUAL MEMBERS OF the SAN ANTONIO CONSERVATION SOCIETY et al.,**
Plaintiffs-Appellants,

versus

The TEXAS HIGHWAY DEPARTMENT et al.,
Defendants-Appellees.

No. 74-1231.

United States Court of Appeals,
Fifth Circuit.

July 5, 1974.

Members of conservation society brought action against Texas Highway Department and Federal Department of Transportation to enjoin construction of an expressway which would pass through parklands in city of San Antonio, Texas. The United States District Court for the Western District of Texas granted joint motion of defendants for summary judgment and denied motion of plaintiffs for a preliminary injunction, and appeal was taken. The Court of Appeals, Thornberry, Circuit Judge, 446 F.2d 1013, reversed and remanded with directions. On remand, the District Court, Jack Roberts, J., granted summary judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that enactment of Federal-Aid Highway Act of 1973, which terminated federal funding for project, had

effect of exempting the project from environmental requirements of federal law, that approval of expressway by Army Corps of Engineers was not necessary so as to constitute a "major federal action" and trigger provisions of National Environmental Policy Act, that compliance by state with the Act was not required on theory that the project was basically a part of one federal-aid highway, that exemption of the project from federal environmental statutes did not violate due process [5468] clause of Federal Constitution, and that claim for attorneys' fees was barred by Eleventh Amendment.

Affirmed.

Tuttle, Circuit Judge, concurred in part and dissented in part and filed opinion.

* * * *

[5470] Appeal from the United States District Court for the Western District of Texas.

Before TUTTLE, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge:

This much litigated and important environmental case has been in the courts for more than six years and is now before us for the second time. The complaint seeks to enjoin the construction of an expressway which would pass through parklands in the City of San Antonio, Texas. Plaintiffs are named individual members of the San Antonio Conservation Society, and defendants are The Tex-

as Highway Department, an administrative agency of the State of Texas, acting by and through the Texas Highway Commission, consisting of DeWitt C. Greer, Herbert C. Petry, Jr., and Garret Morris, and the State Highway Engineer, J. C. Dingwall, termed "state defendants"; and The Federal Department of Transportation, an administrative agency of the United States of America, acting by and through John A. Volpe, Secretary of Transportation; F. C. Turner, Administrator, Federal Highway Admin- [5471] istration; R. R. Bartlesmeyer, Director, Bureau of Public Roads; A. C. Taylor Regional Administrator, Federal Highway Administration; and J. F. Cary, Division Engineer, Bureau of Public Roads, termed "federal defendants."[1]

The question for decision is whether the congressional enactment of section 154 of the Federal-Aid Highway Act of 1973, severing all federal connection with the San Antonio North Expressway, removes that project from the necessity for compliance with the provisions of the National Environmental Policy Act (NEPA) (42 U.S.C. § 4331 et seq.)[2] and section 4(f) of the Department of

1 Each of said persons is also defendant herein as an individual, for acts outside the authority delegated to that defendant, respectively, by the State of Texas and by the United States of America.

2 Section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332, provides in pertinent part:

* * * [A]ll agencies of the Federal Government shall —

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Transportation Act (49 U.S.C. §1653(f)).[3]

Our prior decision (446 F.2d 1013 (1971)) reversed a summary judgment in favor of defendants and held that there had been a failure to comply with the provisions of NEPA and section 4(f) before proceeding with construction of the Expressway. We remanded the case with directions to the district court that it be held until the Secretary of Transportation had complied with his statutory responsibilities after which the district court was to conduct a full review of the matter. In the meanwhile, we ordered that "[c]onstruction shall not proceed until there has been full compliance with the law." *Id.*, at 1029.

The San Antonio North Expressway has been projected since 1959. The disputed segment is approximately six miles long, running about north and south through the middle of the City of San Antonio, and extends between Interstate Loop 410 and Interstate Highway 35. The con-

3 49 U.S.C. § 1653(f) reads as follows:

(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

troversy arises out of the fact that it will traverse portions of the Brackenridge-Olmos Basin Parklands. Its proponents stress the imperative need to solve serious traffic problems of the city; its opponents do not wish it to go through the beautiful Parklands in mid San Antonio. Some time after our initial decision in this case, Congress enacted the Federal-Aid Highway Act of 1973. Section 154 of that Act is directly applicable to the Expressway here, and reads in full as follows:

> Sec. 154. (a) Notwithstanding any other provisions of Federal law or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between Interstate [5473] Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-aid project.
>
> (b) The amount of all Federal-aid highway funds paid on account of sections of the San Antonio North Expressway in Bexar County, Texas (Federal-aid projects numbered U 244(7), U 244(10), UG 244(9), U 244(8), and U 244(11)), shall be repaid to the Treasurer of the United States and the amount so repaid shall be deposited to the credit of the appropriation for "Federal-Aid Highways (Trust Fund)". At the time of such repayment the Federal-aid projects with respect to which funds have been repaid and any other Federal-aid projects located on such expressway and programed for expenditure on such project, if any, such be canceled and withdrawn from the Federal-aid highway

> program. Any amount so repaid, together with the unpaid balance of any amount programed for expenditure on any such project shall be credited to the unprogramed balance of Federal-aid highway funds of the same class last apportioned to the States, respectively. The amount so credited shall be available for expenditure in accordance with the provisions of title 23, United States Code, as amended.

It is undisputed that in conformity with section 154 the State of Texas has returned to the Federal Government all federal-aid funds which it received on account of the Expressway and that it will receive no other federal funds in the future to aid in its construction. All funds received have been restored to the Federal Government and reapportioned among the States. By congressional enactment the Expressway is now entirely a state-financed project.

Upon the passage of section 154 the Federal Government and the State of Texas both moved the district court to dismiss plaintiffs' suit on the ground that removal of all federal funding by Congress exempted the project from compliance with the environmental provisions of NEPA and section 4(f). Plaintiffs contended, however, that passage of section 154 did not exempt the Expressway from the require- [5474] ment that state and federal officials comply with federal environmental statutes specifically designed to protect parklands, especially NEPA and section 4(f). Plaintiffs argued that these statutory requirements are still applicable (1) because the Expressway would traverse an area in which U.S. Army Corps of Engineers' approval would be re-

quired, thus constituting a "major federal action" under 42 U.S.C. § 4332(2)(C) and necessitating an environmental impact statement; (2) because the Expressway was only a small portion of a larger federal-aid network and inextricably related thereto; (3) because it would cross the San Antonio River said to be navigable and for which a U.S. Coast Guard permit would be required, another "major federal action"; and (4) if section 154 did exempt the project, it violated the due process clause of the U.S. Constitution.

The district court ruled adversely to the plaintiffs on all of these issues and held that the San Antonio North Expressway was exempt from the requirements of the federal environmental laws by virtue of the congressional enactment of section 154, which was not unconstitutional. Summary judgment was granted in favor of defendants and plaintiffs bring this appeal. A large volume of evidence, affidavits, depositions, and exhibits was filed by the parties in connection with the motions, and there does not appear to be any serious dispute as to the facts. It is the law as to which the parties have stressed their principal arguments and on which they differ.

We stayed the district court order pending consideration of this appeal.

I.

Plaintiffs contend that section 154 does not in its terms specifically exempt the North Expressway from NEPA, section 4(f) or any other federal law, and the fact that the North Expressway is now exclusively a Texas state

highway project is not dispositive of the environmental issues. They argue [5475] that if Congress intended this result it should have expressly stated it in section 154.

Following this premise the plaintiffs urge that the Expressway will pass through the San Antonio Channel Improvement Project over which the Army Corps of Engineers has jurisdiction, such as, for example, the Olmos Dam and Reservoir situated in the Olmos Basin Parklands which they aver are portions of the Channel Improvement Project.[4] Plaintiffs contend that the State Highway Department must obtain the Army Corps' approval for the Expressway to cross the San Antonio River at Josephine Street and also to traverse the Olmos Dam and Reservoir area. They aver that the prior 1968 approval thereof by the Army Corps is outdated because there have been material changes in the design of the Expressway since that time. Finally they contend that the Army Corps' approval will constitute a "major federal action" and thereby trigger the provisions of NEPA relative to furnishing an environmental impact statement. The defendants, Federal and State Governments, respond that the plain language of section 154 as well as the legislative history make it clear that Congress intended to exempt the North Expressway from the environmental requirements of federal law. They contend that Army Corps' approval of the project insofar as the river crossing at Josephine Street and traversing the Olmos Dam and Reservoir are concerned is not required by statute, regulation, or otherwise and that the Corps has no authority to approve or disapprove the Expressway.

4 The Olmos Reservoir is not included in the Channel Improvement. *See* H.R. Doc. No. 344, 83d Cong., 2d Sess. 46, 49 (1954). The Expressway therefore passes through the San Antonio Channel Improvement Project only at the crossing of the San Antonio River and Josephine Street, and there is no project right of way in this area.

[1] We agree with defendants. Section 154(a) clearly states that *"Notwithstanding any other provisions of Federal law* or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended . . . and the expressway shall cease to be a [5476] Federal-aid project." (Emphasis added.) If Congress had not intended to exempt the Expressway from the environmental statutes, there would have been no purpose in passing the legislation. We cannot believe that Congress intended a vain and useless act. Any doubt about the matter, however, is fully resolved by the legislative history which shows without question that Congress drew the bill with the evident purpose of exempting the Expressway from the provisions of federal environmental laws including NEPA and section 4(f).[5] The debates in the Senate and House disclose this unmistakably, as do the reports of the Senate and House Committees.[6] Federal [5477] control and involvement

5 Section 4(f) requirement is no longer in the case since section 154 eliminated all federal funds on the Expressway and approval of the Secretary of Transportation is thus no longer required. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 407, 411 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

6 See the Majority Report, Senate Public Works Committee, in pertinent part as follows:

TERMINATION OF FEDERALAID RELATIONSHIP, SAN ANTONIO FREEWAY

The San Antonio North Expressway would be terminated as a Federal-aid project and Federal funds programed for the State of Texas for that project would be returned to the United States Department of Transportation for reapportionment among the States. While congressional termination of Federal involvement in such projects is not unprecedented, the Committee recognizes that this is an unusual action and believes it is warranted only because of unusual circumstances.

The project involves a non-Interstate urban expressway located wholly within the limits of the City of San Antonio which was planned and requested by that city in 1959. The

State obtained initial route approval from the Federal Highway Administrator, purchased all rights-of-way, and completed all relocation with approximately $7 million in State and local funds prior to changes in Federal law which later involved it in legal controversy.

The Secretary approved the letting of construction contracts prior to recent Federal court decisions defining the standard by which the administrative approval was to be reviewed. Thus the project has been affected twice by subsequent changes in Federal law and procedures preventing its completion as a Federal-aid project.

As a result, $4 million in construction has been deteriorating and contractors have claimed an additional $4.5 million in damages against the State of Texas. Since the State and municipality have indicated the desire to complete the project with wholly local financing, the Committee believes that it would be proper to allow them to do so.

The Committee's recommendation is not intended to be an adverse comment on the Fifth Circuit Court of Appeals decision of August 5, 1971, setting forth the administrative procedures required of the Secretary of Transportation in approving Federal-aid projects, nor would it prevent future litigation in State court. Its only effect would be to ratify the action of the Secretary of Transportation in accepting the Federal funds already returned by the State and to terminate the Federal-State relationship on the project.

The Committee heard extensive evidence about the project, studied the proposed route and is satisfied that it would not involve significant damage to recreational areas.

S.Rep. No. 93-61, 93rd Cong., 1st Sess. 23, 54-56 (1973).

(See also Senator Buckley's individual views in opposition to passage of the bill added to the Senate Report in which he urges rejection because it would have an effect on NEPA and section 4(f).) The reports of both the Senate and House Committees on Public Works in 1972 when the bill was pending are to the same effect. They contain the following significant language:

> Prior to granting such approval the Committee studied the proposed route and is satisfied that it does not involve significant damage to recreational areas.

S.Rep. No. 92-1081, 92d Cong., 2d Sess. 42, 43 (1972); H.R.Rep. No. 92-1443, 92d Cong., 2d Sess. 33 (1972).

See also Hearings on S. 502 Before Subcomm. on Transportation of the Senate Public Works Comm., 93d Cong., 1st Sess. 372-481 (1973); Hearings on 1973 Highway Legislation (Future Highway Needs) Before Subcomm. on Transportation of the House Public Works Comm., 93d Cong., 1st Sess. (1973); S.Rep. No. 93-61, 93d Cong., 1st Sess. (1973); 119 Cong.Rec.S. 4934-S. 4943 (daily ed. March 15, 1973); 119 Cong.Rec.H. 7418 (Aug. 3, 1973).

The Senate debate in 1972 and 1973 also revealed quite clearly that the

thus came to an end with enactment of section 154.[7]

[5478] [2] Nor was approval of the Expressway by the Army Corps of Engineers necessary so as to constitute a "major federal action" and trigger the provisions of NEPA relative to the requirement of an environmental impact statement before the Expressway can proceed. The Olmos Dam and Reservoir areas and the Josephine Street crossing area are not within Corps jurisdiction or authority. No rights of way have been acquired in the area.[8] As the Corps' witness testified, it would not be able to approve the Expressway plans because there is no Corps project there at the moment.[9] The Corps' opinion

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purpose of the proposed legislation was to exempt the Expressway from environmental control. *See* Senator Nelson's incorporation in the Congressional Record of memorandum of opponents' attorney, Mr. Vardaman; 118 Cong.Rec.S. 14843 (daily ed. September 13, 1972); also Senator Buckley's attempt to delete the provisions relative to the San Antonio Expressway from the Federal-Aid Highway Bill; 118 Cong. Rec.S. 14839-S. 14846 (daily ed. September 13, 1972); 119 Cong.Rec.S. 4724, S. 4726 (daily ed. March 14, 1973); 119 Cong.Rec.S. 4934-S. 4943 (daily ed. March 15, 1973). *See also* Hearings on 1973 Highway Legislation (Future Highway Needs) (93-5) Before the Subcommittee on Transportation of the Committee on Public Works of the House of Representatives, 93d Cong., 1st Sess. (March 19-23, 1973).

7 *Cf.* Ely v. Velde, 4 Cir., 1974, ___ F.2d ___

8 Corps regulations (33 C.F.R. §§ 208.10 et seq.) require approval only if construction is proposed within the limits of the project right of way. Thus they are inapplicable here.

9 In the deposition of George Demeritt, Corps of Engineers, the following testimony is of interest on the question of Corps' approval of the project:

BY MR. ROSENBERG:

Q. Presuming that you were to receive the final plans for the Josephine area, what would be the basis for your review in point, if you received these plans today?

BY MR. DEMERITT:

A. We would review them based on the latest study plan that we would have for the Corps project, which, at present, is the preliminary plans and determine whether our floodway could — they could be incorporated into our floodway plan.

We would make any suggestions we might have that might assist us in our plan, but we would not be able to approve them, because we have no project there at the moment.

was sought by the Texas Highway Department as to whether the project would cause any adverse effect on flood control, and the state was informed that there was no objection though it was not something within the right of the Corps to approve or disapprove. It does not appear that there is any legal requirement that the state obtain Corps' approval.

Thus this case differs from those cited by plaintiffs where federal official approval was necessary, being required by statute, such as Citizens Committee for Hudson Valley, S.D.N.Y. 1969, 302 F.Supp. 1083, aff'd 2 Cir., 425 F.2d 97, cert. denied, 400 U.S. 949, 91 S.Ct. 237, 27 L.Ed.2d 256 (1970), and Zabel v. Tabb, 5 Cir., 1970, 430 F.2d 199, cert. denied, 401 U.S. 910, 91 [5479] S.Ct. 873, 27 L.Ed.2d 808 (1971), where Army Corps of Engineers' approval was statutorily required; also, as in Davis v. Morton, 10 Cir., 1972, 469 F.2d 593, where the Secretary of the Interior was required by statute to ratify or reject leases on Indian reservations. In those cases the Federal Government's role was one of control — or primary jurisdiction — unlike the present case. We find no merit, therefore, in this contention of plaintiffs.

II.

[3] Plaintiffs' second contention is that the Expressway is only a small portion of a larger federal-aid highway network and that even though this segment is to be constructed exclusively with state funds, NEPA must still be complied with by the state. Plaintiffs contend that practically every vehicle using the Expressway will enter or exit from the federal-aid route. Therefore, they argue that the North Expressway is basically a part of one federal-

aid highway. Nevertheless, we cannot ignore the fact that Congress, by section 154, specifically determined that the North Expressway was not to be a federal project. The court below also held that the North Expressway has an independent utility of its own. The Federal Government argues that the congressional enactment of section 154 answers and disposes of this issue since there has now been an express congressional determination that the North Expressway is not a part of a larger federal project. It is true that the Expressway connects with other federal interstate highways at the north and south ends thereof, but defendants point out that virtually every road in the country crosses or interchanges with federal-aid highways, and that there are many state-constructed roads which do not form a part of the federal network. The independent utility of the Expressway is found in its connection of downtown San Antonio with the airport and in its primary purpose to relieve the serious traffic problem in central San Antonio. Accord- [5480] ingly, we hold that the Expressway is properly considered independently of the interstate routes with which it connects.

We approve, therefore, the conclusion of the district court (Judge Roberts), well expressed in this regard as follows:

> While the North Expressway will, coincidentally, provide a link in the interstate highway system in San Antonio, this is not to be its major function. Indeed, a primary reason for the perseverance of the State in its efforts to build the North Expressway is the interest the people of San Antonio have in the completion of this project, an interest which derives not from the coin-

cidental function of the North Expressway as a link in the interstate highway system, but rather from the perceived need for the North Expressway as a major artery of intra-urban transportation. Thus, the North Expressway has an "independent utility of its own," *Id.*, which justifies its consideration separately from surrounding projects for purposes of NEPA. The undisputed facts are that this project is to be financed with non-federal funds, designed and built without federal approval or authorization, and to serve primarily local needs. We cannot conceive this project to be a "major Federal action" within the contemplation of 42 U.S.C. § 4332(2)(C). We conclude, therefore, that no environmental impact statement is necessitated by the relationship of the North Expressway to the interstate highway system.

III.

[4] The issue posed by plaintiffs on the navigability *vel non* of the San Antonio River is now moot. The Army Corps of Engineers made its determination on March 8, 1974 in which it concluded that the San Antonio River at the points involved in this case should not be regarded as a navigable water of the United States. Plaintiff's contention that U.S. Coast Guard approval is required for a bridge to cross the river must, therefore, fail.

[5481] IV.

[5] Plaintiffs finally contend that if Congress' enactment of section 154 did exempt the North Expressway

such action violates the due process clause of the U.S. Constitution by arbitrarily discriminating against plaintiffs and depriving them of rights under federal environmental statutes. They argue that such fundamental federal rights are available to all other citizens in the nation in similar circumstances and that Congress has without any justification deprived them of such rights. They aver that there is no basis for treating the Expressway any differently "from any other federal-aid highway that threatens urban parklands." (Appellants' brief, p. 40.)

The short answer to this contention is that by virtue of section 154 the North Expressway is no longer a federal-aid highway and that the same Congress which enacted the environmental statutes to which plaintiffs refer, concluded to exempt this segment of highway from these laws. The federal-aid highway program was established by Congress and there is no reason apparent why it cannot decide which roads of the nation shall be included in the system. The environmental statutes were designed to apply to federal projects. The Expressway is now a state highway, not a federal highway. Its former federal status has been terminated by act of Congress. Congress having spoken in the matter, we see no reason to attempt to override the solemn expression of its will found in the enactment of section 154.

V.

Plaintiffs have also sought an award of attorneys' fees in this case. They were successful in reversing the judgment of the district court when we first considered the case on appeal and remanded it. After passage of the

Federal Aid Highway Act of 1973, they have been unsuccessful both in the lower court and in this court by our decision herein. They request, [5482] however, as a minimum that they be awarded attorneys' fees through the first appeal. Obviously such an award would be substantial, considering the circumstances of this litigation.

They seek such an award against the state defendants, The Texas Highway Department, an administrative agency of the State of Texas, acting by and through the Texas Highway Commission, consisting of DeWitt C. Greer, Herbert C. Petry, Jr., and Garret Morris, and the State Highway Engineer, J.C. Dingwall. It is conceded that the federal defendants are immunized from an award of attorneys' fees by provisions of 28 U.S.C. § 2412.[10]

The claim for attorneys' fees is asserted under the so-called "private attorney general" theory in that plaintiffs contend they were effectuating important congressional policy by prosecuting this suit.[11] Plaintiffs do not contend

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10 28 U.S.C. § 2412 reads as follows:

§ 2412. Costs

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States. As amended July 18, 1966, Pub.L. 89-507 § 1, 80 Stat. 308.

11 It is clear that no such claim can be properly made as to this appeal because our holding is predicated upon the carrying out of con-

that their efforts in this environmental case have been made inordinately difficult by actions of defendants taken in bad faith or for oppressive reasons. There is, accordingly, no indication of unreasonable or obdurate obstinacy or vexatious or groundless conduct.

[5483] [6, 7] The state defendants respond that sovereign immunity of the State of Texas by virtue of the Eleventh Amendment to the Constitution has also immunized them from an award of attorneys' fees. The recent case of Edelman v. Jordan, ___ U.S. ___, 94 S.Ct. 1347, 39 L.Ed.2d 662, decided by the Supreme Court on March 25, 1974, is cited by the state defendants in support of this contention. It is apparent that any award for attorneys' fees must be paid from the general revenues of the State of Texas. Under the *Edelman* rationale "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[12] *Edelman, supra,* ___ U.S. at ___, 94 S.Ct. at 1356. Cases in which attorneys' fees were awarded because of bad faith or obdurate obstinacy, or under the private attorney general theory against non-state defendants, are clearly inapposite. The claim for attorneys' fees, even if limited to services through the first appeal of this case, is, therefore, barred.

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gressional policy as enunciated by the Federal-Aid Highway Act of 1973, section 154.

12 Nor would there be any difference in principle because some of the defendants are state officers rather than the state itself since the state's Eleventh Amendment immunity would still prevail. *See* Edelman, ___ U.S. at ___, 94 S.Ct. at 1362, *See also* Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 350, 89 L.Ed. 389 (1945).

Conclusion

This controversy has now "been resolved in the Halls of Congress, which is the proper place in our system of Government for priority decisions to be made." 446 F.2d at 1024. We therefore defer to the will of Congress and give effect to its solemn enactment. Here the litigation should end.

Affirmed.

TUTTLE, Circuit Judge (concurring in part and dissenting in part):

While I concur fully with the opinion with respect to the claim on the merits, I respectfully dissent with respect to the disposition of the issue of attorneys' fees. Since the trial [5484] court did not enter any order with respect to the claim for attorneys' fees, I would remand that issue to the trial court to enable it to determine first the extent to which any award might be a charge against state revenues as distinguished from being merely a charge against the individual named defendants.

APPENDIX "G"

[113] Art. 4, § 12. Loan or pledge of public credit; relief of destitute; donations; transfers of property; bonds; leasing of health institutions; donation to U.S. for Veterans Hospital

Section 12. The funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, associations or corporations, public or private; nor shall the State, nor any political corporation, purchase or subscribe to the capital stock or stock of any corporation or association whatever, or for any private enterprise. Nor shall the State, nor any political corporation thereof, assume the liabilities of any political, municipal, parochial, private or other corporation or association whatsoever, except as otherwise provided in this Constitution; nor shall the State undertake to carry on the business of any such corporation or association, or become a part owner therein; provided, the State, through the Legislature, shall have power to grant the necessary rights of way through its public lands for the construction of any railroad, or flood control or navig tion canal; and provided, police juries and municipal corporations may, in providing for destitute persons, utilize any charitable institutions within their corporate limits for the care, maintenance and asylum of such persons; and all appropriations made to such institutions for the purpose aforesaid, shall be accounted for by them in the manner required of officials entrusted with public funds.

Provided further, that the State, or any agency or political corporation or subdivision thereof may, through the authorized representatives thereof, donate by fee simple title, or otherwise convey, to the United States any lands, property, movable and immovable, rights of way, easements or other servitudes, or any of them, which they now own, or may hereafter acquire by purchase, donation, expropriation or otherwise, for the following public purposes; use, in connection with the improvement and maintenance of the navigation of natural waterways, the construction and improvement and maintenance of artificial navigable waterways and river and harbor works of every description and kind authorized by an Act or Acts of the Congress of the United States or Federal Statutes, or otherwise, and in connection with flood control works of every description and kind so authorized, or in connection with airports, flying fields, landing fields, parks, forest preserves, canals, irrigation districts, hospitals, agricultural experiment and research stations, military posts, and for military uses; and for the purpose of acquisition and improvement of property for such purposes, may incur debt, issue bonds and levy taxes as otherwise provided in this Constitution. The State or any of its agencies, political corporations or subdivisions may likewise maintain, in cooperation with or on behalf of the United States or any agency thereof, any right of way, servitude or easement acquired in connection with the construction or improvement of any artificial or natural waterway, any highway or railroad bridge spanning any such waterway.

And provided, further, that the City of New Orleans, through its mayor, is hereby authorized and directed to transfer to the Orleans Parish School Board title to any

and all school property, excepting all property of the Isaac Delgado Central Trades School, now or hereafter standing in the name of the city and dedicated exclusively to school purposes.

[114] And provided, further, that for the purpose of erecting a State capital building for the housing of all departments of the State Government in the City of Baton Rouge, the Board of Liquidation of the State Debt shall fund into bonds constituting general obligations of the State of Louisiana so much of the unpledged surplus of the one and fifteen-hundredth (1.15) mill tax, known as the State Bond and Interest Fund, levied by Act 109 of 1921, as may be necessary, said bonds not to exceed the principal sum of Five Million Dollars ($5,000,000.00) to bear interest at not to exceed five per cent (5%) per annum, shall be dated February 15, 1931, bear interest from date, to be sold for not less than par, and the maturities, beginning with the year 1933, to be so arranged that said bonds will be retired in twenty years and that the sum of not in excess of Two Hundred and Fifty Thousand Dollars ($250,000:00) in principal annually shall be retired and this provision shall be self-operative and shall require no further or other legislation than the necessary resolutions of the Board of Liquidation of the State Debt. As long as any of said bonds are outstanding, said tax shall be levied and collected.

And provided, further, that this Section shall not be held to prohibit the issuance of certificates, notes, bonds or other evidences of debt by said Board of Liquidation of the State Debt, as provided by Act 6 of the Extra Session of 1927.

The Board of Liquidation of the State Debt shall fund into bonds, notes, certificates or other evidences of debt, so much of the surplus of the one and fifteen-hundredth (1.15) mill tax known as the State Bond and Interest Tax Fund, levied by Act 109 of 1921, as may be necessary to pay or refund the indebtedness of the State of Louisiana to the fiscal agent banks of the State, aggregating approximately the sum of $3,482,154.00, more or less; incurred prior to May 9, 1932, and the outstanding indebtedness of Louisiana State University and Agricultural and Mechanical College, as evidenced by certificates of indebtedness issued under authority of its Board of Supervisors, amounting to the sum of $1,000,000.00 which said indebtedness of the Board of Liquidation of the State Debt and said indebtedness of the Louisiana State University and Agricultural and Mechanical College are hereby validated and declared to be the legal and binding indebtedness of the State of Louisiana. Said bonds, notes, certificates, or other evidences of debt shall be general obligations of the State of Louisiana, shall bear interest not exceeding six per centum (6%) per annum, payable semi-annually, shall be dated as may be determined by the Board of Liquidation of the State Debt, shall mature at such times as may be fixed by said Board, but not beyond Twenty (20) years from their dates, and the principal amount thereof shall not exceed $5,000,000.00. Such bonds, notes, certificates or other evidences of debt shall be sold by the Board of Liquidation of the State Debt to the highest bidder or bidders on sealed proposals, after due advertisement for fifteen days prior to the date of sale, the said Board to have the right to reject any or all bids. This provision shall be self-operative, and shall require no further legislation or other action, except the adoption of the

necessary resolutions of the Board of Liquidation of the State Debt. As long as any of said bonds, notes, certificates, or other evidences of debt, are outstanding, said State Bond and Interest Tax Fund tax shall be levied and collected.

(c). This Section shall not be held to prohibit any municipality from leasing or letting out to any person or persons, association or corporation, public or private, a hospital, clinic, sanitarium or any other institution, together with all incidental premises in connection therewith, belonging to or standing in the name of the municipality, provided the lease shall require a minimum of 2% per annum rental fee based on the total value of the facility at the date of the execution of the lease and provided that the question of granting such lease shall be previously submitted to the resident property taxpayers qualified to vote in the municpality wherein such lease is sought to be granted at an election called for that purpose and a majority of those voting, in number and amount, vote in favor thereof. Such election shall be called and held under existing laws providing for the calling and holding of elections to decide the question of incurring debt, issuing bonds and levying special taxes. Provided further, said lease shall assure the public the leased premises shall be [115] exclusively used for the main purpose for which same was acquired by the municipality and the use thereof under said lease shall not be inconsistent with said purpose.

The State of Louisiana is hereby authorized to donate to the United States of America for the purpose of building a United States Veterans Hospital thereon the following described real estate situated in Rapides Parish, Louisiana, to-wit:

West Half (W½) of Northwest Quarter (NW¼), Section One (1), Northwest Quarter (NW¼) of Southwest Quarter (SW¼), Section One (1), Northeast Quarter (NE¼) of Section Two (2) North Half (N½) of Southeast Quarter (SE¼), Section Two (2), All in Township Four (4) North, Range One (1) West, Southwest Quarter (SW¼) of Southwest Quarter (SW¼), Section thirty-six (36), in Township Five (5) North, Range One (1) West, Louisiana Meridian, North of Red River, containing four hundred (400) acres, more or less, together with all rights, ways and privileges belonging or appertaining thereto, and with all buildings and improvements thereon, which do not at this time belong to the United States of America.

The title of all of said property is hereby declared to be vested in the State of Louisiana, and all acts of sale or exchange whereby title thereto has been acquired are hereby ratified and approved.

The State of Louisiana is hereby authorized to donate to the United States of America as a part of such hospital site any other real estate adjoining said described property, which may be declared by the courts to belong to the State of Louisiana. (As amended Acts 1958, No. 555, adopted Nov. 4, 1958).

APPENDIX "H"

[127] ART. IV CONSTITUTION

§ 18. Legislation to enable compliance with federal laws and regulations to secure federal aid in capital improvement projects

Section 18. The Legislature may enact legislation to enable the State, its agencies, municipalities and parishes and their agencies to comply with federal laws and regulations in order to secure federal participation in the cost of capital improvement projects, and the Legislature may authorize the use of funds, dedicated to such agencies of government for other purposes, to meet the requirements of the federal statutes, including, by way of example but not with the intention of limitation, providing relocation assistance payments, housing for relocatees and similar federal requirements. Whenever the Legislature enacts such legislation, to comply with federal requirements for participation in construction projects, the Legislature may extend the legislation to include similar projects financed entirely by state and local governments. Such payments shall be in addition to just compensation for property rights.
(Added by Acts 1971, No. 182,, adopted Feb. 1, 1972.)

APPENDIX "I"

[556] Art. 6 § 22. General highway fund

Section 22. **Sources of revenue.** The General Highway Fund shall be derived from the following sources:

(a) Graded license tax. The Legislature shall impose an annual graded license tax upon all motor vehicles used on the public highways of this State, as follows:

On automobiles for private use, an annual license tax of Three ($3.00) Dollars; on all other motor vehicles, an annual license tax based upon horsepower, carrying capacity or weight, any or all.

The Legislature is authorized to impose an annual graded license tax, based upon horsepower or carrying capacity, either or both, on all passenger motor vehicles used exclusively in the transportation of teachers or pupils to or from schools under contract therefor made by the authorities thereof.

On all other vehicles using the public roads, the Legislature is authorized to impose an annual graded license tax, based upon carrying capacity and tonnage, either or both.

On gasoline, benzine, naphtha and other motor fuels, as defined by law, when sold, used or consumed in the State of Louisiana, there shall be levied a tax not to exceed four (4¢) cents per gallon, to be collected as prescribed by law.

On gasoline, benzine, naphtha and other motor fuels, as defined by law, when sold, used or consumed in the State of Louisiana, there shall be levied an additional tax not to exceed one cent (1¢) per gallon to be collected as prescribed by law.

On all kerosene the Legislature may impose a tax to be collected and the proceeds used for such purposes as may be prescribed by law.

On all other explosives used in the generation of motive power, the Legislature may impose a tax to be collected as may be prescribed by law.

The Legislature shall have the authority to pass to the General Highway Fund any monies derived from any other source.

[557] Hereafter the parishes of the State shall be relieved of all further costs and charges for the construction and maintenance of State Highways, and the same shall be wholly supported out of the highway funds raised in accordance herewith.

(b) Payment of funds into treasury. All funds for the account of the General Highway Fund shall be paid into the State Treasury.

(c) Use of tax proceeds. Except as otherwise provided in this amendment, or until otherwise provided by Constitutional amendment, no debt shall be created or certificates of indebtedness or bonds issued, to be paid in the future out of the proceeds realized from any State tax or

license to be collected under and by virtue of this section, or imposed thereunder by the Legislature, but the said licenses and taxes shall be collected from year to year and expended for the purpose of the construction and maintenance of the system of State highways and bridges.

(d) Bonds; highway commission deficit; pavement; bridges. That in order to provide ready funds for the payment of the deficit of the Louisiana Highway Commission growing out of valid contractual and other obligations entered into or incurred by said Commission prior to May 21, 1928, and in order to construct paved State Highways and necessary bridges in connection therewith, the Board of Liquidation of the State Debt of Louisiana shall have authority to fund, from time to time, such proportion of said tax as is represented by one cent (1¢) per gallon on gasoline, benzine, naphtha or other motor fuel, as hereinabove provided, to run for a period not exceeding twenty (20) years. Said bonds shall be serial and shall have such maturities as may be determined and fixed by the said Board, and shall be issued in such sums and denominations as said Board may determine, for not less than Five Hundred ($500.00) Dollars each, and may be registered or payable to bearer, in the discretion of said Board. Such bonds shall be designated and may contain such provisions as may be by said Board deemed expedient for registration in the name of the holder or for the release thereof from registration, shall bear interest at the rate not exceeding five per centum (5%) per annum, shall be payable in principal and interest in such time or times as the Board may prescribe, not to exceed twenty (20) years from date of issuance, for the payment of the entire principal and interest, and the

place or places of payment of principal and interest shall be fixed by said Board. Said bonds shall be sold to the highest bidder at public sale for not less than par and accured interest, after advertisement at least once a week for not less than thirty (30) days by said Board in New Orleans, Chicago, New York and such other places as said Board may determine, reserving to said Board the right to reject any and all bids, and readvertise.

APPENDIX "J"

[154] CONSTITUTION

Art. 6, § 23. Long Range Highway Fund; revenues to be paid into Fund; bonds for construction, maintenance, improvement and extension of state highways; limitations; withdrawal of funds for state and parish highways and roads; continuation of certain taxes

Section 23. (1) Subject to dedication or other contractual allocations heretofore made by the Constitution there shall hereafter be paid into a special fund in the Treasury to be known as the Long Range Highway Fund, all revenues derived from the following sources:

(a) All taxes levied by or under the Authority of Article VI, Section 22, of the Constitution except the Kerosene tax;

(b) The tax levied by Article VI(A) of the Constitution;

(c) Use fuel tax;

(d) Taxes levied upon lubricating oil;

(e) Taxes for licenses on all motor vehicles and other vehicles on public highways;

(f) The amount of the proceeds of all royalties and bonuses including annual delay rentals and other income dedicated by Article IV, Section 2(c), of the Constitution to the Louisiana Department of Highways.

No pledge or dedication of the aforesaid sources shall hereafter be made except as provided in this Section.

(2) To provide funds for the construction, maintenance, improvement and extension of State highways and the necessary bridges, overpasses, underpasses and tunnels situated thereon, the Board of Highways for and on behalf of the State of Louisiana, by and with the consent of the State Advisory Board, may issue bonds of the State of Louisiana, the principal and interest of which, irrespective of the dates of issuance thereof, shall be payable, on a parity, primarily from the moneys in the Long Range Highway Fund. Such bonds shall be the general obligations of the State of Louisiana, for the payment of which the full faith and credit of the State shall be pledged. The payment of the principal and interest of said bonds shall be the first charge upon the moneys in the Long Range Highway Fund and the Treasurer of Louisiana shall in each fiscal year set aside for the pay-

ment of the principal and interest of all bonds issued under the authority of this Section, which may then be outstanding, the aggregate amount of the principal and interest due thereon in such fiscal year and the amount contracted to be set aside in said fiscal year in sinking funds or reserve funds for the payment of the principal of such bonds dues in subsequent fiscal years. Said bonds shall mature at such time or times as the Board of Highways shall determine within twenty-five (25) years from their date, and shall bear interest at a rate not exceeding four per centum (4%) per annum, payable semi-annually, and shall be in such denominations and form as the Board of Highways shall determine, and shall be redeemable at such times and at such redemption premiums as shall be determined by the Board of Highways and set forth in said bonds. The principal and interest of said bonds shall be payable in lawful money of the United States of America at the office of the Treasurer of the State of Louisiana, in the City of Baton Rouge, Louisiana, or at the State's fiscal agency in the City of New York, State of New York, at the option of the holder. Said bonds shall be sold to the highest bidder upon sealed proposals at public sale for not less than par and accrued interest, after advertisement published by the Board of Highways at least ten (10) days in advance of the date of sale in newspapers or financial journals published in the Cities of New Orleans, Louisiana, Chicago, Illinois, New York, New York, and such other places as the Board of Highways may determine, reserving to the Board of Highways the right to reject any and all bids, and the right to readvertise for new bids in the manner herein provided.

Said bonds shall be signed by the Governor, the Auditor

and the Treasurer of the State of Louisiana, provided that the signatures of the Governor and Auditor on said bonds may be printed, lithographed or engraved thereon. Any coupons attached to said bonds shall bear the facsimile signature of the Treasurer of the State of Louisiana. Said bonds are hereby declared to have the qualities of negotiable instruments under the law of Louisiana, and shall not be [155] invalid for any irregularity or defect in the proceedings for the issuance and sale thereof and shall be incontestable in the hands of bona fide purchasers or holders thereof.

No proceedings or approvals with respect to such bonds or the issuance and sale thereof shall be necessary except such as are contemplated by this Section.

(3)(a) No bonds may be issued under the authority of this Section unless the moneys paid into the Long Range Highway Fund during the preceding fiscal year shall have been not less than twice the maximum payment required to be made in any fiscal year on account of the principal, interest, sinking fund or reserve fund requirements with respect to all bonds issued and outstanding under authority of this Section and the bonds then proposed to be issued, which facts shall be certified to the Board of Highways by the Treasurer of Louisiana and the determination of such facts so made by the Treasurer of Louisiana shall be conclusive.

(b) No more than Thirty Million Dollars ($30,000,000.00) in bonds shall be issued in any one fiscal year and no more than a total of Sixty Million Dollars ($60,000,000.00) in bonds shall be issued under the authority of this Section. This provision is hereby ex-

cepted from the contractual obligation to the holders of the bonds issued under authority of this Section and may be changed by constitutional amendment without violating the contractual arrangement with said bondholders.

(4) The Department of Highways shall be entitled to withdraw in each fiscal year all moneys remaining in the Long Range Highway Fund, after the Treasurer of Louisiana shall have first set aside the amounts required for the payment of the principal of and the interest upon outstanding bonds issued under authority of this Section, and shall be entitled to use such moneys for the construction, maintenance, improvement and extension of State highways and the necessary bridges, overpasses, underpasses and tunnels situated thereon, and for the construction of roads and bridges on the parish road system, now or hereafter existing, in the amount of Two Million Three Hundred Fifty-seven thousand Dollars ($2,357,000.00) each fiscal year.

(5) The tax of four cents (4¢) per gallon on gasoline, benzine, naphtha and other motor fuels and the additional tax thereon of one cent (1¢) per gallon now levied under authority of Article VI, Section 22, of the Constitution, shall continue to be levied until all dedications of the proceeds of said taxes heretofore made shall have expired, at which time said taxes shall be consolidated into a tax of five cents (5¢) per gallon on gasoline, benzine, naptha and other motor fuels and said tax shall continue to be levied so long as any bonds issued under authority of this Section are outstanding and the proceeds of such tax shall be paid into the Long Range Highway Fund and applied as provided in this Section.

If science or invention should reduce the use and consumption of gasoline, benzine, naphtha or other motor fuels to such an extent that the tax on such commodities should not be sufficient to retire the bonds issued under the authority of this Section, including the interest due thereon, then the Legislature shall have the authority to levy a tax upon any commodity, substance, appliance or paraphernalia, or to impose a license upon the right to sell or make use of such commodity, substance, appliance or paraphernalia, which may be sold or used to generate or supply motor fuel or other power for transportation; to levy such tax or license, or both, or such other taxes as may be necessary to pay said bonds and the interest thereon, and this authority shall in no wise affect the tax levied under the authority of the Constitution and statutes of the State upon gasoline, benzine, naphtha or other motor fuel as defined by law, or be subject to any limitation imposed by the Constitution.

In like manner, the one cent (1¢) gasoline tax levied under Article VI(A), of the Constitution, the use fuel tax, the tax on lubricating oil, and taxes for licenses on all motor vehicles and other vehicles shall continue to be levied so long as any bonds issued under authority of this Section are outstanding and the proceeds of such taxes subject to prior dedication, as aforesaid, shall be paid into the Long Range Highway Fund and applied as provided in this Section.

APPENDIX "K"

Art. 6, § 23

(6) Except as otherwise provided in Section (3)(b) hereof, the provisions of this Section shall constitute a contract between the State of Louisiana and the holder or holders of any bonds or coupons issued under the authority hereof. (Added Acts 1955, No. 141, adopted Nov. 6, 1956.)

§ 23.1 Financing of construction, maintenance, improvement and extension of highways

Section 23.1 (1) (a) To provide funds for the construction, maintenance, improvement and extension of State and Parish highways and the necessary bridges, overpasses, underpasses and tunnels situated thereon, the Board of Highways for and on behalf of the State of Louisiana, by and with the consent of the State Advisory Board, may issue bonds of the State of Louisiana, the principal and interest of which, irrespective of the dates of issuance thereof, shall be payable, on a parity with Sixty Million Dollars ($60,000,000.00) in bonds authorized, issued and outstanding in accordance with the provisions of Act No. 141 of the Regular Session of the Legislature of Louisiana, 1955, adopted as an amendment to the Constitution of Louisiana at an election held November 6,

1956, primarily from the moneys in the Long Range Highway Fund. Such bonds shall be the general obligations of the State of Louisiana, for the payment of which the full faith and credit of the State shall be pledged. The payment of the principal and interest of said bonds, together with the bonds authorized, issued and outstanding in accordance with the provisions of said Act No. 141 of the Regular Session of the Legislature, 1955, shall be the first charge upon the moneys in the Long Range Highway Fund and the Treasurer of Louisiana shall in each fiscal year set aside for the payment of the principal and interest of all bonds issued under the authority of this Section, which may then be outstanding, the aggregate amount of the principal and interest due thereon in such fiscal year and the amount contracted to be set aside in said fiscal year in sinking funds or reserve funds for the payment of the principal of such bonds due in subsequent fiscal years. Said bonds shall mature at such time or times as the Board of Highways shall determine within twenty-five (25) years from their date, and shall bear interest at a rate not exceeding four per centum (4%) per annum, payable semi-annually, and shall be in such denominations and form as the Board of Highways shall determine, and shall be redeemable at such times and at such redemption premiums as shall be determined by the Board of Highways and set forth in said bonds. The principal and interest of said bonds shall be payable in lawful money of the United States of America at the office of the Treasurer of the State of Louisiana, in the City of Baton Rouge, Louisiana, or at the State's fiscal agency in the City of New York, State of New York, at the option of the holder. Said bonds shall be sold to the highest bidder upon sealed proposals at public sale for not less than par and accrued interest, after

advertisement published by the Board of Highways at least ten (10) days in advance of the date of sale in newspapers or financial journals published in the Cities of New Orleans, Louisiana, Chicago, Illinois, New York, New York, and such other places as the Board of Highways may determine, reserving to the Board of Highways the right to reject any and all bids, and the right to readvertise for new bids in the manner herein provided.

Said bonds shall be signed by the Governor, the Comptroller and the Treasurer of the State of Louisiana, provided that the signatures of the Governor and Comptroller on said bonds may be printed, lithographed or engraved thereon. Any coupons attached to said bonds shall bear the fascimile signature of the Treasurer of the State of Louisiana. Said bonds are hereby declared to have the qualities of negotiable instruments under the law of Louisiana, and shall not be invalid for any irregularity or defect in the proceedings for the issuance and sale thereof, and shall be incontestable in the hands of bona fide purchasers or holders thereof.

No proceedings or approvals with respect to such bonds or the issuance and sale thereof shall be necessary except such as are contemplated by this Section.

(b) Ten (10%) per centum of proceeds of all bonds issued under the provisions herein shall be allocated for expenditure by the parishes of the state of Louisiana for parish road purposes, said allocation to be apportioned to the parishes on the basis of the number of miles and the cost per mile of parish roads in each parish which are maintained by the police jury. The funds derived from the sale of the percentage of bonds herein allocated for expen-

diture by the parishes shall be apportioned to the governing authorities of said parishes in such amounts as it shall be determined they are entitled to under the provisions hereinabove contained. The governing authorities of the said parishes shall expend such funds as they are received from the sale of the bonds herein provided for on the construction, maintenance, improvement and extension of parish roads and the necessary bridges, overpasses, underpasses and tunnels situated thereon. Said construction, maintenance, improvement and extension is to be approved of and performed by the Department of Highways.

(2) (a) No bonds may be issued under the authority of this Section unless the moneys paid into the Long Range Highway Fund during the preceding fiscal year shall have been not less than twice the maximum payment required to be made in any fiscal year on account of the principal, interest, sinking fund or reserve fund requirements with respect to all bonds issued and outstanding under authority of Article VI, Section 23, of the Constitution of Louisiana, and of this Section and the bonds then proposed to be issued, which facts shall be certified to the Board of Highways by the Treasurer of Louisiana and the determination of such facts so made by the Treasurer of Louisiana shall be conclusive.

(b) No more than Thirty Million Dollars ($30,000,000.00) in bonds shall be issued in any one fiscal year and no more than a total of Sixty Million Dollars ($60,000,000.00) in bonds shall be issued under the authority of this Section. This provision is hereby excepted from the contractual obligation to the holders of the bonds issued under authority of this Section and may

be changed by constitutional amendment without violating the contractual arrangement with said bondholders.

(3) The Department of Highways shall be entitled to withdraw in each fiscal year all moneys remaining in the Long Range Highway Fund, after the Treasurer of Louisiana shall have first set aside the amounts required for the payment of the principal of and the interest upon outstanding bonds issued under authority of Article VI, Section 23, of the Constitution of Louisiana, and of this Section, and shall be entitled to use such moneys for the construction, maintenance, improvement and extension of State highways and the necessary bridges, overpasses, underpasses and tunnels situated thereon, and for the construction of roads and bridges on the parish road system, now or hereafter existing, in the amount of Two Million Three Hundred Fifty-seven Thousand Dollars ($2,357,000.00) each fiscal year.

(4) The tax of four cents (4¢) per gallon on gasoline, benzine, naphtha and other motor fuels and the additional tax thereon of one cent (1¢) per gallon now levied under authority of Article VI, Section 22, of the Constitution, shall continue to be levied until all dedications of the proceeds of said taxes shall have expired, at which time said taxes shall be consolidated into a tax of five cents (5¢) per gallon on gasoline, benzine, naphtha and other motor fuels and said tax shall continue to be levied so long as any bonds issued under authority of this Section are outstanding and the proceeds of such tax shall be paid into the Long Range Highway Fund and applied as provided in this Section.

If science or invention should reduce the use and consumption of gasoline, benzine, naphtha or other motor fuels to such an extent that the tax on such commodities should not be sufficient to retire the bonds issued under the authority of this Section, including the interest due thereon, then the Legislature shall have the authority to levy a tax upon any commodity, substance, appliance or paraphernalia, or to impose a license upon the right to sell or make use of such commodity, substance, appliance or paraphernalia, which may be sold or used to generate or supply motor fuel or other power for transportation; to levy such tax or license, or both, or such other taxes as may be nec- [158] essary to pay said bonds and the interest thereon, and this authority shall in no wise affect the tax levied under the authority of the Constitution and statutes of the State upon gasoline, benzine, naphtha or other motor fuel as defined by law, or be subject to any limitation imposed by the Constitution.

In like manner, the one cent (1¢) gasoline tax levied under Article VI(A), of the Constitution, the use fuel tax, the tax on lubricating oil, and taxes for licenses on all motor vehicles and other vehicles shall continue to be levied so long as any bonds issued under authority of this Section are outstanding and the proceeds of such taxes subject to prior dedication, as aforesaid, shall be paid into the Long Range Highway Fund and applied as provided in this Section.

(5) Except as otherwise provided in Section (2) (b) hereof, the provisions of this Section shall constitute a contract between the State of Louisiana and the holder or holders of any bonds or coupons issued under the authority hereof. (Added Acts 1961, No. 101, adopted Nov. 6, 1962.)

APPENDIX "L"

[552] **OFFICERS AND BOARDS**

§ 19.1. Expropriation; highway purposes

Section 19.1. The Legislature shall have authority to authorize the taking of property for highway purposes by orders rendered ex parte in expropriation suits prior to judgment therein provided that provision be made for deposit before such taking with a court officer for the amount of appraisals of the property so taken and damages to which the owner thereof may be entitled, if any, which appraisals may be made in such manner as may be provided by law either before or after institution of suit, and need not be by judicially appointed appraisers. (Added Acts 1948, No. 548, adopted Nov. 2, 1948. Eff. Dec. 10, 1948.)

APPENDIX "M"

[5465] EFFECTIVE DATE OF RELOCATION PROVISIONS

Senate amendment

This section would extend the time required for compliance by the States with certain provisions of chapter 5 of title 23 (Highway Relocation Assistance), until January 1, 1971, for any State which could not submit the required constitutional amendment for ratification prior to July 1, 1970.

House bill

This section extends the deadline for State compliance with the relocation provisions of chapter 5 of title 23, United States Code, from July 1, 1970, to July 1, 1972, for any State which must amend its constitution to comply with chapter 5 and cannot submit the required amendment for ratification prior to July 1, 1970.

[5466] Louisiana is the only State affected by this provision. That State must amend its constitution in order to comply with chapter 5.

Conference substitute

Same as the provisions of the House bill.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-604

DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,
Appellee-Petitioner,

versus

BEAIRD-POULAN, INC.,
Appellant-Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Appellant-Respondent,
Beaird-Poulan Inc.

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DEPARTMENT OF HIGHWAYS, STATE OF LOUISIANA,
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versus

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

QUESTIONS PRESENTED

Beaird-Poulan Inc., Respondent herein, is dissatisfied with the Statement of Questions presented by the Department of Highways, State of Louisiana, petitioner herein, and shows that the following are the true questions presented:

A. Whether or not Article IV, Section 12, and/or Article VI, Section 22(c) of the Louisiana Constitution prevented the Department of Highways, State of Louisiana, from making relocation payments required by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("Relocation Act") during the period from January 2, 1971, through March 1, 1972.

B. Are the decisions of the Court of Appeals for the Fifth Circuit in this case and in *Named Individual Members of San Antonio Conservation Society v. The Texas Highway Department*, ___ F.2d ___ (1974), in conflict?

STATEMENT OF THE CASE

This two-count suit was brought by plaintiff, Beaird-Poulan Inc. against the Department of Highways, State of Louisiana (Department of Highways), and against John A. Volpe,[1] Secretary of Transportation (Secretary). Count One seeks a money judgment in favor of Beaird-Poulan and against the Department of Highways in the amount of $217,082.46 for moving expenses incurred by Beaird-Poulan. Count Two seeks a mandatory injunction against the Secretary to compel him to perform duties imposed upon him by an Act of Congress. This suit was brought pursuant to the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 84

1 Mr. Volpe's successor in office, Claude S. Brinegar, was substituted as party defendant (App. 30).

Stat. 1894, 42 U.S.C. §§ 4621-4638 (hereinafter called the Relocation Act).

The complaint alleges that Beaird-Poulan is a "displaced person," as defined in the Relocation Act and Department of Transportation (DOT) Regulations. The relocation move of Beaird-Poulan's manufacturing plant and offices to make way for I-220, a federally-assisted project, is alleged to have taken place during the months of April and May, 1971. The complaint further alleges that the Department of Highways has refused to pay the moving expenses or to process an administrative claim therefor.

As to the Secretary, the complaint seeks to compel him to comply with certain mandatory duties imposed upon him by the Relocation Act relating to compliance with the Relocation Act by the Department of Highways.

The District Court dismissed Beaird-Poulan's complaint for failure to state a claim upon the ground that Article IV, Section 12, of the Constitution of Louisiana prevented the Department of Highways from complying with the Relocation Act prior to March 1, 1972, and therefore the Relocation Act was not effective insofar as Louisiana was concerned at the time of the displacement of Beaird-Poulan during April and May of 1971. The Court of Appeals reversed and remanded for further proceedings.

ARGUMENT

I

Louisiana Law Did Not Prohibit The Department Of Highways From Complying With The Relocation Act.

The Relocation Act was passed by the 91st Congress for the express purpose stated in the Act, as follows:

> "The purpose of this title is to establish a uniform policy for the fair and equitable treatment of persons displaced as the result of federal and federally assisted programs in order that such persons shall not suffer disproportionate injuries as the result of programs designed for the benefit of the public as a whole." (Relocation Act, § 201).

Without going into detail concerning the rather complicated provisions of the Relocation Act, suffice it to say for present purposes that the Relocation Act provides for the payment of moving expenses to those persons displaced by the acquisition of immovable property for federal projects or federally assisted projects, including highways.

For present purposes, the critical provision in the Relocation Act is § 221, which establishes its effective date:

> "(a) Except as provided in subsections (b) and (c) of this section, this Act and the

amendments made by this Act shall take effect on the date of its enactment [January 2, 1971].

"(b) Until July 1, 1972, sections 210 and 305 shall be applicable to a State only to the extent that such State is able under its laws to comply with such sections. After July 1, 1972, such sections shall be completely applicable to all States."

The true question presented by this case, therefore, is whether or not the Department of Highways was prohibited by the Laws of Louisiana from complying with the federal statute. If it was not, the Act became effective on January 2, 1971, and its petition for certiorari should be denied.

The provision of the laws of Louisiana to which the Department of Highways has principally pointed is Article IV, § 12 of the Louisiana Constitution of 1921. The pertinent part of Article IV, § 12, reads as follows:

"The funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, associations or corporations, public or private; nor shall the State, nor any political corporation, purchase or subscribe to the capital stock or stock of any corporation or association whatever, or for any private enterprise. Nor shall the State, nor any political corporation thereof, assume the liabilities of any political, municipal, parochial, private or

other corporation or association whatsoever, except as otherwise provided in this Constitution; nor shall the State undertake to carry on the business of any such corporation or association, or become a part owner therein; provided, the State, through the Legislature, shall have power to grant the necessary rights of way through its public lands for the construction of any railroad, or flood control or navigation canal; and provided, police juries and municipal corporations may, in providing for destitute persons, utilize any charitable institutions within their corporate limits for the care, maintenance and asylum of such persons; and all appropriations made to such institutions for the purpose aforesaid, shall be accounted for by them in the manner required of officials entrusted with public funds. . . ."

Strange as it may seem, the Department of Highways contends that it could not comply with an obligation imposed upon it by federal law because to comply with the obligation would be to make an unlawful gift.

Because of the Department of Highway's contention that Louisiana, and only Louisiana, was unable to comply with the Relocation Act and that the exception to the effective date was enacted for its benefit, one would suppose Article IV, Section 12, to be unique to Louisiana's Constitution. That, however, is far from the case.

Of the three states which border Louisiana, we find that each of them has a provision in its Constitution similar to Article IV, Section 12:

Mississippi Constitution of 1890,
Article 7, §§ 258 and 183.
Arkansas Constitution, Article 16,
§ 1; Article 12, § 5, and Amendment 13.
Texas Constitution of 1876, Article 3,
§§ 50, 51.

The pertinent parts of these Constitutional provisions are reproduced in the Appendix hereto.

Yet, according to the Department of Highways, only Louisiana could not comply with the Relocation Act.

There are no reported decisions to our knowledge concerning the ability of other states to comply with the Relocation Act.[2] However, the Federal Highway Act of 1956 provided for discretionary relocation payments to utility companies in a manner similar to the mandatory payments set forth for displaced persons in general in the Relocation Act. Relocation payments under that statute were litigated.

In *State v. City of Dallas*, 319 S.W.2d 767 (Tex. Civ. App. 1958) and *State v. City of Austin*, 331 S.W.2d 737 (Tex. 1960), the Courts of Texas held that a statute authorizing the payment of relocation expenses was

---

2 *Barnes v. Tarrytown Urban Renewal Agency*, 338 F Supp. 262 (S.D.N.Y. 1971), involved the question as a subsidiary issue in a suit to enjoin enforcement of Section 114(e) of the Housing Act of 1949, as amended, 42 U.S.C. § 1465(e).

not in contravention of the Texas counterpart to Article IV, Section 12. Of the "donation" contention, the Texas Court of Civil Appeals said:

> "The constitutional provisions in issue in these cases are similar to such provisions of other states and were designed to prevent the giving away of public funds and not to deny the Legislature the use of State funds for governmental purposes . . .
>
> "Clearly the construction of State highways is a governmental or public purpose and in the public interest." 319 S.W.2d at pp. 775-776.

In *Opinion of the Justices*, 132 A.2d 613 (N.H. 1957), the New Hampshire Supreme Court advised the Senate of that state that payment of utility relocation expenses was permissible under the New Hampshire Constitution.

In *Northwestern Bell Tel. Co. v. Wentz*, 103 N.W.2d 245 (N.D. 1960), North Dakota's counterpart to Article IV, Section 12, was held not to prohibit payment of utility relocation expenses. Minnesota's Supreme Court was of the same opinion in *Minneapolis Gas Company v. Zimmerman*, 91 N.W.2d 642 (Minn. 1958), as was West Virginia's in *State ex rel Appalachian Power Co. v. Gaines*, 143 S.E.2d 351 (W.Va. 1965), and Montana's in *Jones v. Burns*, 357 P.2d 22 (Mont. 1960), and Utah's in *State Road Commission of Utah v. Utah Power & Light Co.*, 353 P.2d 171 (Utah 1960), and Tennessee's in *Pack v. Southern Bell Tel. & Tel. Co.*, 387 S.W.2d 789 (Tenn. 1965), and so on.

The state jurisprudence overwhelmingly held that payment of relocation expenses to utility companies under the Federal-Aid Highway Act of 1956 did not violate Article IV, Section 12-type Constitutional prohibitions.

The Department of Highways can not point to a single decision of the courts of Louisiana which suggests, much less holds, that the payment of relocation expenses would violate Article IV, Section 12.

The most relevant case which we can find in the Louisiana jurisprudence is *Department of Highways v. Southwestern Electric Power Company*, 243 La. 564, 145 So.2d 312 (1962). That case involved the question of whether or not certain public utility companies had the right to be reimbursed for the expense of moving their facilities from the streets of the City of Shreveport in order to accommodate the construction of Interstate Highway 20 through Shreveport. The facilities had been laid on public ways pursuant to franchises granted to the utility companies by the City of Shreveport. The federal law in existence at that time, the Federal-Aid Highway Act of 1956, (23 U.S.C. § 123(a)) provided that "*When* a state shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the federal-secondary systems or on the interstate system" federal funds may be used to reimburse the state for the federal percentage applicable on that project, i.e., as pertains to Interstate 20, 90% federal reimbursement. The federal law at that time *did not require* any relocation payments. In its original opinion, the Louisiana Supreme Court held that the state must reimburse the

utility companies for the expenses of moving their facilities. It dismissed out of hand the state's contention that it could not by law reimburse the expenses since to do so would be a gift. 145 So.2d at 314. On rehearing, the Court held that the utility companies *did not have a right* to be reimbursed for the expenses of relocating their facilities since their property right in the public streets was subject to the rights of the state to compel the relocation. In its opinion on rehearing, the Court summarized its decision as follows:

> "... Liability of plaintiff for the costs of removal of the utilities' facilities from the public way is not to be determined on its right under the Federal statute to obtain reimbursement of a large proportion of the costs from the United States. On the contrary, such liability is to be resolved by the laws of this State. *The fact that our law may not prohibit reimbursement of the utilities has nothing to do with the plaintiffs' liability for reimbursement.* We hold that no such liability legally exists." 145 So.2d at 329.

The significance of the holding in the *Swepco* case is that the court rejected the Department of Highways' argument that to pay these expenses would be to make a gift and it also rejected the utility companies' argument that the mere fact that the State could recoup 90% of the expenses created an obligation to pay them.

The *Swepco* decision is even more significant when it is considered in context with the opinion of the Court of Appeal. The Louisiana Supreme Court, on rehear-

ing, reversed the Court of Appeal on grounds other than that relating to Article IV, Section 12. The Court of Appeal dismissed the Department of Highways' contention that Article IV, § 12, prohibited it from paying relocation costs by saying:

> "We observe the contention in brief of counsel for plaintiff that the State is prohibited from paying defendants' costs under Article IV, Section 12 of the Constitution. This unqualified statement is not supported by further argument and *our examination of Section 12, which prohibits the use of the credit of the State for the benefit of "* * * any person or persons, associations or corporations, public or private; * * *", completely fails to establish any basis for the conclusion urged.* Plaintiff's actions in the matter destroy this argument, for if it would be a violation to use the funds available for the benefit of a private corporation, it is equally illegal to use such funds for the benefit of a public corporation — the City of Shreveport. *We reject this argument as being without merit.*" 127 So.2d at 319. (Emphasis added).

Placed in the perspective of the federal law existing now, the *Swepco* decision directly supports the position of Beaird-Poulan in this case and, we submit, completely destroys the contention of the Department of Highways that Article 4, § 12, of the Louisiana Constitution prohibits it from complying with the federal law, which law now requires the Department of Highways to pay relocation expenses on federal-aid projects such as I-220.

The *Swepco* case holds that the Department of Highways *can pay* relocation expenses *if it must*. The Relocation Act says that the Department of Highways *must pay* relocation expenses *if it can*.

The Department of Highways also cites *James v. Rapides Parish Police Jury*, 113 So.2d 88 (La. App. 1959). That case simply holds that the Rapides Parish Police Jury could not pay $750 per year for a membership in a non-profit corporation named the Red River Valley Improvement Association. More appropriate authority would be *Caldwell Bros. v. Board of Supervisors*, 176 La. 825, 147 So. 5 (1933), in which the Louisiana Supreme Court stated the purpose of Article IV, Section 12, in terms remarkably similar to that used by the Texas Court quoted above:

> "Nor is the proposed action of the board in violation of section 12 of article 4 of the Constitution of 1921, which reads that: 'The funds, credit, property or things of value of the State or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private.'
>
> "*The purpose of this article was not to hamper state agencies or boards in the exercise of their proper functions, or in the conduct of their legitimate affairs, but to put an end to the practice of the Legislatures to pledge the credit of the state to aid private enterprises.* Benedict v. City of New Orleans, 115 La. 655, 39 So. 792." 147 So. at p. 7. (Emphasis added)

The Court of Appeals decision does not compel the Louisiana Legislature to lend it credit or make a grant. Instead, it only compels the Department of Highways to comply with an obligation imposed upon it by federal law in connection with its construction of I-220. Compliance with the "law of the land" is surely a proper function and legitimate affair of the Department of Highways.

We cannot understand how the payment by the Department of Highways to a person who has suffered an actual loss can be a donation when such a payment is required by an Act of Congress. There is obviously no donative intent on the part of the payor or Congress — only the intent to see that the payee is fully compensated for his loss. There is no gain on the part of the payee — he is only reimbursed for his actual and reasonable expenses.

Moving expenses are not recoverable as an item of damage in condemnation actions under Louisiana law, or, indeed, under any condemnation law of which we are aware. They never have been and are not now. That is the reason that the Relocation Act was passed by Congress, giving the displacee a separate right to recover his relocation expenses. But because relocation expenses were not recoverable under the state condemnation law does not mean that to pay them now under federal law is to make a donation.

The Department of Highways argues that the relocation expenses were not compensable under state condemnation law; therefore, to pay them would be to make a gift. This reasoning ignores the fact that the

Relocation Act, an Act of Congress, obligated the Department of Highways to make the payments. To make relocation payments is simply to satisfy a federal obligation, not to make a gift.

The argument of the Department of Highways is further undercut by the traditional treatment of relocation expenses. Moving expenses are not payable in condemnation cases because they are *damnum absque injuria*. E.g., *Rapides Parish School Board v. Nassif*, 232 La. 218, 94 So.2d 240 (1957), among many others.

Damnum absque injuria means:

> "Literally 'A loss without an injury;' damage without legal injury, or legal remedy. It is a phrase used to describe a loss arising from acts or conditions which do not create a ground of legal redress. The idea contained in the phrase is expressed more explicitly in the maxim, Ex damno sine injuria non oritur actio." 25A C.J.S.; verbo Damnum.

In other words, the law says to the unfortunate plaintiff, "I know you were hurt, but for some reason (and there may be many different reasons) you may not recover your damages." The federal statute now provides that the plaintiff can recover. This is not to say, however, that there is a "charitable donation," only that now the displacee can recover his true damages.

A more homely example would be the following situation: Under Louisiana law there is no recovery

for alienation of affection. If the Louisiana Legislature passed an act creating such a right of action, it would be most unlikely that anyone would consider the payment of a judgment by the paramour to the outraged spouse as a gift. New rights of action and new obligations are continually being created by both courts and legislatures. The law changes. The Relocation Act takes the *absque* out of the maxim, but that creates no gift situation.

The reason advanced for regarding moving costs as *damnum absque injuria* in condemnation actions is that these are " 'particular sacrifices which society has the right to inflict for the public good.' " *Rapides Parish School Board v. Nassif*, 232 La. 218, 94 So.2d 240 (1957). Quoting *McMahon et al v. St. Louis, A. & T.R. Co.*, 41 La. Ann. 827, 6 So. 640, 641 (1889). On the other hand, the specific purpose of Congress in enacting the Relocation Act was so that displaced persons "shall not suffer disproportionate injuries as the result of programs designed for the benefit of the public as a whole." Relocation Act § 201.

The relocation payments mandated by Congress do not evidence a desire of Congress to be generous, but something much more fundamental. They represent a change in policy concerning the basic concept about public projects. The House Public Works Committee reflected the change in policy in its report on the Relocation Act as follows:

> "The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 is the culmination of lengthy and extensive ef-

forts to develop legislation establishing a uniform policy for the fair and equitable treatment of persons who are displaced, or have their real property taken for Federal and federally assisted programs. The need for such legislation arises from the increasing impact of Federal and federally assisted programs as such programs have evolved to meet the needs of a growing and increasingly urban population. In a less complex time, Federal and federally assisted public works projects seldom involved major displacements of people. There was relatively little taking of residential or commercial property for farm-to-market routes or for reservoirs or public buildings. Indeed, local support for such projects often resulted in little, if any, cost for land acquisition or rights-of-way. However, with the growth and development of an economy which is increasingly urban and metropolitan, the demand for public facilities and services has increasingly centered on such urban areas, and the acquisition of land for such projects has become the most difficult facet of many undertakings by public agencies. Also, a major public project — be it a highway, urban renewal project, or hospital — inevitably involves the acquisition and clearance of sites which now provide residential, commercial, or other services. As the thrust of Federal and federally assisted programs have shifted from rural to urban situations, it became increasingly apparent that the application of traditional concepts of

> valuation and eminent domain resulted in inequitable treatment for large numbers of people displaced by public action. When applied to densely populated urban areas, with already limited housing, the result can be catastrophic for those whose homes or businesses must give way to public needs. The result far too often has been that a few citizens have been called upon to bear the burden of meeting public needs."

House Report No. 91-1656, 91st Congress, 2nd Sess., 3 U.S. Code Congressional & Admin. News, pp. 5850-5851.

In our times we have seen many comparable changes in policy. Injuries long suffered without right to compensation have been made compensable.

The Department of Highways also argues that payment of relocation costs to Beaird-Poulan would have been a prohibited diversion of highway dedicated funds contrary to Article VI, Sections 22(c), 23 and 23.1 of the Louisiana Constitution. Yet in *Short & Murrell v. Department of Highways*, 233 La. 735, 98 So.2d 170 (1957), the Louisiana Supreme Court held that dedicated highway monies could be used to pay $136,365.00 for architectural services rendered in connection with the planning and designing of an administration building for the Department of Highways.

We fail to see how the Department of Highways can seriously contend that, although it can use the

highway funds to build itself an administration building, it is prohibited from using those funds to pay relocation expenses. The payment of federally required relocation expenses is clearly much more directly a highway purpose than constructing an administration building.

II

The Fifth Circuit Decision Is Not Discriminatory.

The Department of Highways contends that the decision of the Fifth Circuit in this case is in conflict with its decision in *Named Individual Members of San Antonio Conservation Society v. The Texas Highway Department et al.*, ___ F.2d ___ (No. 74-1231, 5th Cir. 1974). We submit that an examination of the opinions in the two cases, which are printed as Appendices to the Petition for Certiorari herein, reveal the fallacy of this contention. The Act of Congress involved in the *San Antonio Park* case was the Federal-Aid Highway Act of 1973, P.L. 93-87, 87 Stat. 250, specifically Section 154 thereof, which reads in pertinent part as follows:

> "Sec. 154. (a) Notwithstanding any other provisions of Federal law or any court decision to the contrary, the contractual relationship between the Federal and State Governments shall be ended with respect to all portions of the San Antonio North Expressway between Interstate Highway 35 and Interstate Loop 410, and the expressway shall cease to be a Federal-aid project. . . ."

The Act of Congress involved in this suit is the Relocation Act, specifically Section 221 thereof, which reads as follows:

> "(a) Except as provided in subsections (b) and (c) of this section, this Act and the amendments made by this Act shall take effect on the date of its enactment [January 2, 1971].
>
> "(b) Until July 1, 1972, sections 210 and 305 shall be applicable to a State only to the extent that such State is able under its laws to comply with such sections. After July 1, 1972, such sections shall be completely applicable to all States."

Section 154 of the Federal-Aid Highway Act of 1973 specifically and unequivocally ended the Federal-State relationship as to the San Antonio North Expressway. On the other hand, Section 221 of the Relocation Act does not specifically and unequivocally except Louisiana from compliance therewith. For the two statutes to be parallel, Section 221(b) of the Relocation Act would have to read as follows:

> "(b) Until July 1, 1972, sections 210 and 305 shall apply to all States, except the State of Louisiana. After July 1, 1972, such sections shall be completely applicable to all States."

It does not so read, and Congress made no judgment as what the laws of Louisiana prohibited. The plain language of Section 221 refers that decision to the judiciary. Since the statutes involved in the two

decisions are radically dissimilar, it can not be said that the decisions are in conflict.

We call to the Court's attention that this case and the *San Antonio Park* case were decided on the same day by the same panel of the Fifth Circuit. Indeed, they were orally argued on the same day. These facts, we submit, strongly support the proposition that the two decisions, rather than being in conflict, involve radically different statutes.

We further point out to the Court that the legislative history relied upon by the Department of Highways and quoted in Appendix "M" to its Petition for Certiorari relates to the Federal-Aid Highway Act of 1970, P.L. 91-605, 84 Stat. 1713. Section 120 of that Act amended Section 37 of the Federal-Aid Highway Act of 1968 to read, in part, as follows:

> "(b) In the case of any State (1) which is required to amend its constitution to comply with Sections 502, 505, 506, 507 and 508 of Title 23, United States Code, and (2) which cannot submit the required constitutional amendment for ratification prior to July 1, 1970, the date of July 1, 1970, contained in subsection (a) of this section shall be extended to July 1, 1972."

Thus, the Federal-Aid Highway Act of 1970 is more restrictive insofar as the contentions of the Department of Highways are concerned than is the Relocation Act. The Relocation Act, however, was enacted

subsequent to and repealed the conflicting portions of the Federal-Aid Highway Act of 1970.

CONCLUSION

The decision of the Fifth Circuit is, we submit, correct, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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Attorney for
Beaird-Poulan Inc.,
Respondent

PROOF OF SERVICE

STATE OF LOUISIANA,
PARISH OF CADDO.

BEFORE ME, the undersigned authority, personally came and appeared:

THOMAS J. WYATT

who, after being by me first sworn, did depose and say: That he is the attorney of record for Beaird-Poulan

Inc., Respondent, that he certifies that on this date he has served three copies of the foregoing brief on Jesse S. Guillot, attorney of record for Department of Highways, State of Louisiana, by placing same in the United States Mail, airmail postage prepaid, to his office at Post Office Box 44245, Capitol Station, Baton Rouge, Louisiana, 70804; also three copies to John J. Zimmerman, Esq., attorney for the Secretary of Transportation, by placing same in the United States mail, airmail postage prepaid, to his office address, Appellate Section, Land and Natural Resources Division, Department of Justice, Washington, D. C. 20530; also three copies to the Solicitor General, Department of Justice, Washington, D. C., 20530, on this, the ____ day of February, 1975, at Shreveport, Louisiana.

Thomas J. Wyatt
11th Floor,
Mid South Towers
Post Office Drawer B
Shreveport, Louisiana 71161
Attorney for
Beaird-Poulan Inc.

SWORN TO and SUBSCRIBED before me, Notary, this, the ____ day of February, 1975.

NOTARY PUBLIC
in and for
Caddo Parish, Louisiana.

APPENDIX

Texas Constitution

Article 3, § 50:

> "The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever."

Article 3, § 51:

> "The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; . . . ."

Mississippi Constitution

Article 14, § 258:

> "The credit of the state shall not be pledged or loaned in aid of any person, association, or corporation; and the state shall not become a stockholder in any corporation or association, nor assume, redeem, secure, or pay any in-

debtedness or pretended indebtedness alleged to be due by the state of Mississippi to any person, association, or corporation whatsoever, claiming the same as owners, holders, or assignees of any bond or bonds, now generally known as 'Union Bank' bonds and 'Planters Bank' bonds."

Article 7, § 183:

"No county, city, town, or other municipal corporation shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation, or loan its credit in aid of such corporation or association. All authority heretofore conferred for any of the purposes aforesaid by the legislature or by the charter of any corporation, is hereby repealed. Nothing in this section contained shall affect the right of any such corporation, municipality, or county to make such subscription where the same has been authorized under laws existing at the time of the adoption of this Constitution, and by a vote of the people thereof, had prior to its adoption, and where the terms of submission and subscription have been or shall be complied with, or to prevent the issue of renewal bonds, or the use of such other means as are or may be prescribed by law for the payment or liquidation of such subscription, or of any existing indebtedness."

Arkansas Constitution

Article 16, § 1:

> "Neither the State nor any city, county, town or other municipality in this State, shall ever lend its credit for any purpose whatever; nor shall any county, city, town or municipality ever issue any interest-bearing evidences of indebtedness, except such bonds as may be authorized by law to provide for and secure the payment of the indebtedness existing at the time of the adoption of the Constitution of 1874, and the State shall never issue any interest bearing treasury warrants or scrip."

Article 12, § 5:

> "No county, city, town or other municipal corporation shall become a stockholder in any company, association or corporation; or obtain or appropriate money for, or loan its credit to, any corporation, association, institution or individual."